

Nos. 12317-12318-12319

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

Appellant,

vs.

LLOYD BABLER, RICHARD BABLER, JAMES A. POLLOCK and J. H. SCHESTAK, doing business as Lloyd Babler,

Appellees.

and

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY and LLOYD BABLER, doing business as Babler and Conley,

Appellees.

and

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY, HARRY BABLER and LLOYD BABLER, doing business as Babler Brothers,

Appellees.

Transcript of Record

Appeals from the District Court of the United States
for the District of Oregon

FILED

OCT 28 1949

PAUL P. O'BRIEN,

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Appeals from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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No. 12317

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

LLOYD BABLER, RICHARD BABLER,
JAMES A. POLLOCK and J. H. SCHES-
TAK, doing business as Lloyd Babler,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

NAMES AND ADDRESSES OF ATTORNEYS

HENRY L. HESS,

United States Attorney, and

GENE B. CONKLIN,

Assistant United States Attorney,

Room 506 United States Court House,

Portland, Oregon,

For Appellant.

THOMAS R. WINTER,

Special Assistant to Chief Counsel,

Treasury Department,

713 Smith Tower Building,

Seattle, Washington,

Also for Appellant.

CARL E. DAVIDSON and

CHARLES P. DUFFY,

1525 Yeon Building,

Portland, Oregon,

For Appellees.

In the District Court of the United States
for the District of Oregon

Civil No. 4133

LLOYD BABLER, RICHARD BABLER, JAMES
A. POLLOCK, and J. H. SCHESTAK, dba
Lloyd Babler,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

COMPLAINT

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property, together with penalties and interest thereon, illegally assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Section 24 (5) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 5, United States Code.

II.

During the period from April 1, 1945, to December 31, 1945, Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, plaintiffs

herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs employed certain truck drivers to transport road materials for them and paid said truck drivers at a specified rate.

III.

The Commissioner of Internal Revenue, wrongfully asserting that said truck drivers were not the employees of the plaintiffs but that they were persons engaged in the business of transporting property for hire, assessed a tax against plaintiffs equal to 3% of the amounts so paid by plaintiffs to said truck drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$893.87, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$893.87, with interest

thereon from the date of payment, and for their costs and disbursements incurred herein.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,

1525 Yeon Building, Portland
4, Oregon,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

ANSWER

The defendant, by his attorney, Henry L. Hess, Esquire, United States Attorney for the District of Oregon, in answer to the complaint states:

I.

The allegations contained in paragraph I of the complaint are admitted except it is denied that the taxes, together with penalties and interest thereon, were illegally assessed against and collected from the plaintiffs.

II.

The allegations contained in paragraph II of the complaint are denied except it is admitted that during the period from April 1, 1945, to December 31, 1945, Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak were engaged as partners in a general contracting business.

III.

The allegations contained in paragraph III of

the complaint are denied except it is admitted that transportation taxes, interest and penalties in the total amount of \$893.87 were assessed against plaintiffs.

IV.

The allegations contained in paragraph IV of the complaint are admitted.

Wherefore, the defendant prays that plaintiffs' complaint be dismissed with costs to be assessed against the plaintiffs.

HENRY L. HESS,

United States Attorney,

Attorney for the Defendant.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon and one of defendant's attorneys herein, hereby certify that I have made service of the foregoing Answer upon the plaintiff by depositing a duly certified copy thereof in the U. S. Post Office at Portland, Oregon, on the 18th day of August, 1948, enclosed in an envelope with postage thereon prepaid addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Building, Portland 4, Oregon, attorneys of record for plaintiff.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed Aug. 18, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause having come on regularly for a pre-trial conference before the Honorable James Alger Fee, one of the Judges of the above-entitled Court, at Portland, Oregon, on the 27th day of September, 1948, plaintiff J. H. Schestak appearing in person, and all plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the following proceedings were had and done:

Admitted Facts

It appears from the pleadings and the pre-trial proceedings that the following facts are admitted and may be taken and deemed by the court on the trial of this action as established facts therein:

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States,

II.

During the period from April 1, 1945, to December 31, 1945, Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain road construction or resurfacing work, and in order to carry out said contracts entered into verbal agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries, or other locations, to the sites of the roads which they were constructing or resurfacing. The owners of these trucks were paid on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against plaintiffs equal to 3% of the amounts allegedly paid by plaintiffs to said truck owners on an hourly, load or yard-mile basis during the aforesaid period, together with penalties and interest thereon.

IV.

That attached hereto, marked Exhibit "A," and by reference made a part hereof, is a representative

form of statement by the plaintiffs to their truck owners. In this instance the truck owner, George Greenberg, owned two trucks, one of which was driven by himself and one by another truck driver. Each truck owner was charged back against the amount due on an hourly, load or yard-mile basis the amount shown thereon as wages to himself and truck drivers, and a 10% payroll insurance item.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue, their claim for refund of \$893.87, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Plaintiffs' Contentions

I.

That all of said truck drivers were employees of the plaintiffs and that said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

II.

That all of the transportation taxes in question

were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

Defendants' Contentions

I.

That the truck owners were "persons engaged in the business of transporting property for hire," and, as such, were liable for collecting from the plaintiffs the tax imposed by Section 3475 of the Internal Revenue Code, and for filing returns (on Form 727) for all taxes so collected, and the plaintiffs were liable for paying the tax.

II.

That the drivers of the trucks, to the extent that they drove their own trucks, were not employees of the plaintiffs, but were "persons engaged in the business of transporting property for hire."

III.

That the drivers of the trucks, to the extent that they did not drive their own trucks, were not employees of the plaintiffs, but were the employees of the owner of the truck which they drove.

Issues of Fact and Law to Be Determined

I.

Whether the drivers of the trucks, to the extent that they drove their own trucks, were employees of the plaintiffs, or whether they were persons engaged in the business of transporting property for

hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

II.

Whether the drivers of the trucks, to the extent that they did not drive their own trucks, were employees of the plaintiffs or employees of the owners of the trucks, and the owners were persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

III.

Whether plaintiffs are entitled to a refund of the taxes, penalties and interest paid by them as prayed for in the complaint herein.

Exhibits

Plaintiff introduced in evidence as their only pre-trial exhibit certain work sheets showing, during the period involved, the names of the owners of the trucks and the number of trucks owned by them, amounts paid on an hourly, load or yard-mile basis, less deductions claimed to be paid as wages to drivers of the trucks and other adjustments and settlements made with truck owners; defendant introduced no exhibits at the pre-trial conference.

It is agreed by the parties that this pre-trial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice.

The court finding that the foregoing clearly and

accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pre-trial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the court.

Dated this 4th day of April, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ CHARLES P. DUFFY,
Of Attorneys for Plaintiffs.

/s/ THOMAS R. WINTER,
Of Attorneys for Defendant.

EXHIBIT "A"

Babler Bros.
Contractors
4617 S. E. Milwaukie Ave.
Portland 2, Oregon

TO George Greenberg DR.
Tillamook, Oregon

Oct. 6, 1945

Crater Lake-Fort Klamath Timber Access Road
Contract #2735.

Truck #1	4139½	yard mile haul @ .09¢ per yd. mile	\$372.55
Truck #3	3866½	" " " @ .09¢ " " "	347.99

Total Credits.....\$720.54

Less:

Payroll—Greenberg	\$103.95	
Webb	111.10	
	<hr/> 215.05	
10% payroll insurance	21.50	\$236.55
	<hr/>	<hr/>

Final payment Amount of this check \$483.99

Paid by Check #717
October 6, 1945

Voucher 208

[Endorsed]: Filed April 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McColloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon; and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pre-trial order previously made and entered herein; and

The court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised, does make the following

Findings of Fact

I.

Plaintiffs instituted this action to recover taxes on amounts paid for the transportation of property, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from April 1, 1945, to December 31, 1945, Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain road construction and resurfacing work, and in order to carry out said contracts entered into verbal lease agreements with various owners of trucks for the purpose of transporting bulk

construction material from stockpiles, quarries and other locations to the sites of the roads which they were constructing or resurfacing. The owners of these trucks were paid a rental on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against the plaintiffs equal to 3% of the amounts paid by plaintiffs to said truck owner-operators and drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs on October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$893.87, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

V.

All of said truck drivers, whether they were truck owners or not, were subject to the will and control of the plaintiffs, not only as to what should be done but how it should be done, and plaintiffs had the right to discharge said truck drivers, whether truck owners or not, at any time.

From the foregoing Findings of Fact, the court draws the following

Conclusions of Law

I.

That all of said truck drivers, whether truck owners or not, were employees of the plaintiffs during the period in question.

II.

That said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

III.

That the hauling of the bulk construction materials from stock piles, quarries and other locations to the sites of the roads which plaintiffs were constructing or resurfacing did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

IV.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

V.

That by reason of the foregoing plaintiffs are entitled to recover judgment against defendant for the sum of \$893.87, together with interest thereon at the rate of 6% per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

Receipt of a copy of the within proposed Findings of Fact and Conclusions of Law is hereby acknowledged this 25th day of May, 1949.

/s/ GENE B. CONKLIN,
Of Attorneys for Defendant.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

JUDGMENT

This cause, having come on regularly for trial without a jury before the Honorable Claude Mc-

Colloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pre-trial order previously made and entered herein, and

The court having considered fully all matters of fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Fact and Conclusions of Law have heretofore been signed by the court and entered of record on the .. day of May, 1949,

Now Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$893.87, together with interest thereon at the rate of 6 per cent per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE
UNITED STATES COURT OF APPEALS

Notice is hereby given that Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 26, 1949 in favor of the plaintiffs.

Dated this 25th day of June, 1949.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Notice of Appeal to the United States Court of Appeals by depositing in the United States Post Office at Portland, Oregon, on the 25th day of June, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid addressed to Carl E. Davidson and Charles P. Duffy, Attorneys at Law, 1525 Yeon Building,

Portland 4, Oregon, Attorneys of record for Plaintiffs.

/s/ GENE B. CONKLIN,
Assistant U. S. Attorney.

[Endorsed]: Filed June 25, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The Defendant, having taken appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment rendered by the District Court of the United States for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

The District Court erred in finding that plaintiffs entered into lease agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries and other locations to the sites of the roads and airports which they were constructing.

II.

The District Court erred in finding that plaintiffs entered into similar agreements with the truck owners for the purpose of transporting some of their employees to the site of the construction job.

III.

The District Court erred in finding that the truck owners were paid a rental on an hourly, load or yard-mile basis.

IV.

The District Court erred in finding that all of the truck drivers were subject to the will and control of the plaintiffs not only as to what should be done, but how it should be done.

V.

The District Court erred in entering each and every conclusion of law.

VI.

The District Court erred in entering judgment for plaintiffs.

VII.

The District Court erred in not entering judgment for defendant.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify

that I have made service upon the plaintiffs of the foregoing Statement of Points on Which Defendant Intends to Rely on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the District of Oregon:

Defendant, Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, hereby designates the entire record in this case to be contained in the record on appeal which is described as follows:

1. All pleadings.
2. Pre-Trial Order.
3. Transcript of proceedings of the trial.
4. All trial exhibits.
5. Findings of Fact and Conclusions of Law.

6. Judgment.

7. Notice of Appeal to the Circuit Court of Appeals.

8. Statement of Points on Which Plaintiff Intends to Rely on Appeal.

9. This designation.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Designation of Contents of Record on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

ORDER TRANSMITTING EXHIBITS

On motion of defendant and appellant herein, and good cause appearing therefor, it is hereby

Ordered that all of the exhibits and the transcript of proceedings in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal in this case.

Dated this 28th day of July, 1949, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

Civil No. 4133

1948

June 21—Filed complaint.

June 21—Issued summons—to Marshal.

June 25—Filed summons with return of service.

Aug. 18—Filed answer.

Aug. 23—Entered order setting for pre-trial Sept.
27, 1948. Fee.

Sept. 27—Record of pre-trial & order continuing to
Oct. 26 for further pre-trial & trial. Fee.

Oct. 19—Filed praecipe U. S. for issuance of sub-
poenas.

1948

Oct. 19—Filed praecipe U. S. for issuance of subpoena duces tecum.

Oct. 20—Issued subpoena—to Marshal.

Oct. 20—Issued subpoena duces tecum—to Marshal.

Oct. 21—Entered order canceling pre-trial & trial dates. Fee.

Oct. 26—Filed (3) Subpoena duces tecum.

1949

Feb. 7—Entered order setting for trial on April 5, 1949. McC.

Mar. 29—Entered order resetting for trial on April 4, 1949. 1:30 P.M. McC.

Apr. 1—Filed praecipe U. S. for subpoenas.

Apr. 1—Issued 4 subpoenas—to Marshal.

Apr. 2—Filed defendant's motion for subpoena duces tecum.

Apr. 2—Filed and entered order for subpoena duces tecum. McC.

Apr. 2—Issued subpoena duces tecum—to Marshal.

Apr. 4—Filed and entered pre-trial order. McC.

Apr. 4—Record of trial before court, order consolidating for trial with Civ. 4134 and 4135 and order for plaintiff to submit brief in 2 weeks; defendants 3 weeks thereafter and plaintiff 1 week thereafter. McC.

Apr. 6—Filed subpoena duces tecum with Marshal's return.

Apr. 6—Filed 4 subpoenas with Marshal's return.

Apr. 11—Filed exhibits 1 to 4 inc.

1949

Apr. 18—Filed plaintiffs brief.

May 13—Filed brief of defendant.

May 20—Entered order that plaintiff prepare Findings of Fact, Conclusions and Judgment. McC.

May 20—Filed plaintiff's reply brief.

May 26—Filed and entered Findings of Fact and Conclusions of Law. McC.

May 26—Filed and entered judgment for plaintiff for \$893.87 together with interest at 6% from Oct. 20, 1947. McC.

June 1—Filed cost bill of plaintiff.

June 25—Filed notice of appeal to the United States Court of Appeals.

July 27—Filed designation of contents of record on appeal.

July 27—Filed statement of points on which defendant intends to rely on appeal.

July 28—Filed and entered order to forward exhibits. McC.

July 28—Filed transcript of proceedings, Apr. 4, 1949.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, pre-trial order, findings of fact and conclusions of law, judgment, notice of appeal, statement of points, designation of contents of rec-

ord, order to send original exhibits, transcript of docket entries, and this certificate constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4133, in which Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, dba Lloyd Babler, are plaintiffs and appellees, and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, is appellant and defendant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of testimony dated April 4, 1949, filed in this office in this cause, together with exhibits 1 to 4 inclusive.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 1st day of August, 1949.

LOWELL MUNDORFF,

Clerk,

[Seal] By /s/ P. L. BUCK,

Chief Deputy.

[Endorsed]: No. 12317 United States Court of Appeals for the Ninth Circuit. Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant vs. Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, doing business as Lloyd Babler, Appellees. Transcript of Record. In two volumes. Volume I Appeal from the United States District Court for the District of Oregon.

Filed August 3, 1949.

Clerk of the United States Court of Appeals for the Ninth Circuit.

/s/ PAUL P. O'BRIEN,

No. 12318

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY and LLOYD
BABLER, doing business as Babler and
Conley,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

HENRY L. HESS,
United States Attorney, and

GENE B. CONKLIN,
Assistant United States Attorney,
Room 506 United States Court House,
Portland, Oregon.

THOMAS R. WINTER,
Special Assistant to Chief Counsel,
Treasury Department,
713 Smith Tower Building,
Seattle, Washington.

For Appellant.

CARL E. DAVIDSON and
CHARLES P. DUFFY,
1525 Yeon Building,
Portland, Oregon.

For Appellees.

In the District Court of the United States
for the District of Oregon

Civil No. 4134

J. N. CONLEY, M. J. CONLEY, and
LLOYD BABLER, dba Babler and Conley,
Plaintiffs,

v.

HUGH H. EARLE, Collector of Internal
Revenue for the District of Oregon,
Defendant.

COMPLAINT

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property and persons, together with penalties and interest thereon, illegally assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 and Section 3469 of the Internal Revenue Code of the United States, Title 26, Sections 3475 and 3469, United States Code. Jurisdiction of this action is based on Section 24 (5) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 5, United States Code.

II.

During the period from May 1, 1944, to April 1, 1945, J. N. Conley, M. J. Conley and Lloyd Babler, plaintiffs herein, were engaged as partners in a gen-

eral contracting business. As a part of said business, plaintiffs employed certain truck drivers to transport road materials and persons for them and paid said truck drivers at a specified rate.

III.

The Commissioner of Internal Revenue, wrongfully asserting that said truck drivers were not the employees of the plaintiffs but that they were persons engaged in the business of transporting property and persons for hire, assessed a tax against plaintiffs on the amounts so paid by plaintiffs to said truck drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$173.11, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$173.11, with interest there-

on from the date of payment, and for their costs and disbursements incurred herein.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,

1525 Yeon Building,

Portland 4, Oregon.

Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

ANSWER

The defendant, by his attorney, Henry L. Hess, Esquire, United States Attorney for the District of Oregon, in answer to the complaint states:

I.

The allegations contained in paragraph I of the complaint are admitted except it is denied that the taxes, together with penalties and interest thereon, were illegally assessed against and collected from the plaintiffs.

II.

The allegations contained in paragraph II of the complaint are denied except it is admitted that during the period from May 1, 1944 to April 1, 1945 J. N. Conley, M. J. Conley and Lloyd Babler were engaged as partners in a general contracting business.

III.

The allegations contained in paragraph III of the complaint are denied except it is admitted that transportation taxes, interest and penalties in the total amount of \$173.11 were assessed against plaintiffs.

IV.

The allegations contained in paragraph IV of the complaint are admitted.

Wherefore, the defendant prays that plaintiffs' complaint be dismissed with costs to be assessed against the plaintiffs.

HENRY L. HESS,

United States Attorney,

Attorney for the Defendant.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America

District of Oregon, ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon and one of defendant's attorneys herein, hereby certify that I have made service of the foregoing Answer upon the plaintiff by depositing a duly certified copy thereof in the U. S. Post Office at Portland, Oregon, on the 18th day of August, 1948, enclosed in an envelope with postage thereon prepaid addressed to Messrs. Carl E. Davidson and Charles P. Duffy,

1525 Yeon Building, Portland 4, Oregon, attorneys of record for plaintiff.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed Aug. 18, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause having come on regularly for a pre-trial conference before the Honorable James Alger Fee, one of the Judges of the above-entitled court, at Portland, Oregon, on the 27th day of September, 1948, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the following proceedings were had and done:

Admitted Facts

It appears from the pleadings and the pre-trial proceedings that the following facts are admitted and may be taken and deemed by the court on the trial of this action as established facts therein:

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property and persons, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant,

purporting to act under the authority of Section 3475 and Section 3469 of the Internal Revenue Code of the United States, Title 26, Sections 3475 and 3469, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from May 1, 1944, to April 1, 1945, J. N. Conley, M. J. Conley and Lloyd Babler, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain road construction and resurfacing work on a marine base at Klamath Falls, Oregon, and other locations, and in order to carry out said contracts, entered into verbal agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries, or other locations, to the sites of the roads and the marine base, which they were constructing or resurfacing. The owners of these trucks were paid on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others; plaintiffs also, during said period, entered into an oral agreement with one or more truck owners for the purpose of transporting workers to or from a construction job.

III.

The Commissioner of Internal Revenue asserting that said truck owner-operators and drivers were

not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire; and asserting that to the extent that workers were transported, the amounts paid to the truck owners were taxable as amounts paid for the transportation of persons by motor vehicle, assessed transportation taxes against the plaintiffs equal to 3% or 15%, respectively, of the amounts allegedly paid by plaintiffs to said truck owners on an hourly, load or yard-mile basis during the aforesaid period, together with penalties and interest thereon.

IV.

That attached hereto, marked Exhibit "A," and by reference made a part hereof, is a representative form of statement by the plaintiffs to their truck owners. In this instance the truck owner, George Greenberg, owned two trucks, one of which was driven by himself and one by another truck driver. Each truck owner was charged back against the amount due on an hourly, load or yard-mile basis the amount shown thereon as wages to himself and truck drivers, and a 10% payroll insurance item.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed under Section 3475 and Section 3469 of the Internal Revenue Code, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal

Revenue, their claim for refund of \$173.11, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Plaintiffs' Contentions

I.

That all of said truck drivers were employees of the plaintiffs and that said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

II.

That the amounts paid for the transportation of plaintiffs' employees were not taxable under the provisions of Section 3469 of the Internal Revenue Code of the United States, Title 26, Section 3469, United States Code.

III.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

Defendant's Contentions

I.

That to the extent that the trucks were used for

the transportation of property, the truck owners were "persons engaged in the business of transporting property for hire," and, as such, were liable for collecting from the plaintiffs the tax imposed by Section 3475 of the Internal Revenue Code, and for filing returns (on Form 727) for all taxes so collected, and the plaintiffs were liable for paying the tax; that to the extent that the trucks were used for the transportation of workers, the amounts paid to the truck owners were taxable as "amounts paid * * * for the transportation * * * of persons * * * by motor vehicle" under Section 3469 of the Internal Revenue Code.

II.

That the drivers of the trucks, to the extent that they drove their own trucks, were not employees of the plaintiffs but were "persons engaged in the business of transporting property for hire."

III.

That the drivers of the trucks, to the extent that they did not drive their own trucks, were not employees of the plaintiffs, but were the employees of the owner of the truck which they drove.

Issues of Fact and Law to be Determined

I.

Whether the drivers of the trucks, to the extent that they drove their own trucks, were employees of the plaintiffs, or whether they were persons engaged in the business of transporting property

for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

II.

Whether the drivers of the trucks, to the extent that they did not drive their own trucks were employees of the plaintiffs or employees of the owners of the trucks, and the owners were persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

III.

Whether or not the amounts paid for the transportation of plaintiffs' employees were taxable under the provisions of Section 3469 of the Internal Revenue Code of the United States, Title 26, Section 3469, United States Code.

IV.

Whether plaintiffs are entitled to a refund of the taxes, penalties and interest paid by them as prayed for in the complaint herein.

Exhibits

Plaintiffs introduced in evidence as their only pre-trial exhibit certain work sheets showing, during the period involved, the names of the owners of the trucks and the number of trucks owned by them, amounts paid on an hourly, load or yard-mile basis, less deductions claimed to be paid as wages to drivers of the trucks and other adjust-

ments and settlements made with truck owners; defendant introduced no exhibits at the pre-trial conference.

It is agreed by the parties that this pre-trial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice.

The court finding that the foregoing clearly and accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pre-trial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the court.

Dated this 4th day of April, 1948.

/s/ CLAUDE McCOLLOCH,

Approved:

/s/ CHARLES P. DUFFY,

of Attorneys for Plaintiffs.

/s/ THOMAS R. WINTER,

of Attorneys for Defendant.

EXHIBIT "A"

Babler Bros.
Contractors
4617 S. E. Milwaukie Ave.
Portland 2, Oregon

TO George Greenberg DR.
Tillamook, Oregon

Oct. 6, 1945

Crater Lake-Fort Klamath Timber Access Road
Contract #2735.

Truck #1	4139½ yard mile haul	@ .09¢ per yd. mile	\$372.55
Truck #3	3866½ " " "	@ .09¢ " " "	347.99
Total Credits.....			\$720.54

Less:

Payroll—Greenberg	\$103.95	
Webb	111.10	
	<hr/> 215.05	
10% payroll insurance	21.50	\$236.55

Final payment	Amount of this check	\$483.99
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Paid by Check #717
October 6, 1945

Voucher 208

[Endorsed]: Filed April 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McCulloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon; and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein; and

The court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised, does make the following

Findings of Fact

I.

Plaintiffs instituted this action to recover taxes on amounts paid for the transportation of property and persons, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant purporting to act under the authority of Section 3475 and Section 3469 of the Internal Revenue Code of the United States, Title 26, Sections 3475 and 3469, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from May 1, 1944, to April 1, 1945, J. N. Conley, M. J. Conley and Lloyd Babler, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain road construction and resurfacing work on a marine base at Klamath Falls, Oregon, and on other locations, and in order to carry out said contracts entered into verbal lease

agreements with various owners of trucks for the purpose of transporting bulk construction material from stock piles, quarries and other locations to the sites of the roads and marine base which they were constructing or resurfacing. The owners of these trucks were paid a rental on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others. Plaintiffs also during said period entered into similar agreements with the truck owners for the purpose of transporting some of their employees to the site of the construction job.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, and asserting that to the extent that plaintiffs' employees were transported, the amounts paid to the truck owners were taxable as amounts paid for the transportation of persons by motor vehicle, assessed transportation taxes against the plaintiffs equal to 3% or 15%, respectively, of the amounts paid by plaintiffs to said truck owner-operators and drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs on October 20, 1947, under threat of seizure and sale of their property by defend-

ant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed under Section 3475 and Section 3469 of the Internal Revenue Code, and thereafter and on November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$173.11, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

V.

All of said truck drivers, whether they were truck owners or not, were subject to the will and control of the plaintiffs, not only as to what should be done but how it should be done, and plaintiffs had the right to discharge said truck drivers, whether truck owners or not, at any time.

From the foregoing Findings of Fact, the court draws the following

Conclusions of Law

I.

That all of said truck drivers, whether truck owners or not, were employees of the plaintiffs during the period in question.

II.

That said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal

Revenue Code of the United States, Title 26, Section 3475, United States Code.

III.

That the hauling of the bulk construction materials from stock piles, quarries and other locations to the sites of the roads and marine base which they were constructing or resurfacing did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

IV.

That the transportation of some of plaintiffs' employees to the sites of the construction job did not constitute the transportation of persons within the purview of Section 3469 of the Internal Revenue Code of the United States, Title 26, Section 3469, United States Code.

V.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

VI.

That by reason of the foregoing plaintiffs are entitled to recover judgment against defendant for the sum of \$173.11, together with interest thereon at the rate of 6% per annum from October 20, 1947,

and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

Receipt of a copy of the within proposed Findings of Fact and Conclusions of Law is hereby acknowledged this 25th day of May, 1949.

/s/ GENE B. CONKLIN,
of Attorneys for Defendant.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

JUDGMENT

This cause, having come on regularly for trial without a jury before the Honorable Claude McCulloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein, and

The court having considered fully all matters of

fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Fact and Conclusions of Law have heretofore been signed by the court and entered of record on the ———day of May, 1949,

Now Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

It is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$173.11, together with interest thereon at the rate of 6 per cent per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS

Notice is hereby given that Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on May 26, 1949 in favor of the plaintiffs.

Dated this 25th day of June, 1949.

HENRY L. HESS,

United States Attorney

for the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

CERTIFICATE OF SERVICE BY MAIL

United States of America

District of Oregon, ss

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Notice of Appeal to The United States Court of Appeals by Depositing in the United States Post Office at Portland, Oregon, on the 25th day of June, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Carl E. Davidson and Charles P. Duffy, Attorneys at Law, 1525 Yeon Building, Portland 4, Oregon, Attorneys of record for Plaintiffs.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

[Endorsed]: Filed June 25, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The Defendant, having taken appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment rendered by the District Court of the United States for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

The District Court erred in finding that plaintiffs entered into lease agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries and other locations to the sites of the roads and airports which they were constructing.

II.

The District Court erred in finding that plaintiffs entered into similar agreements with the truck owners for the purpose of transporting some of their employees to the site of the construction job.

III.

The District Court erred in finding that the truck owners were paid a rental on an hourly, load or yard-mile basis.

IV.

The District Court erred in finding that all of

the truck drivers were subject to the will and control of the plaintiffs not only as to what should be done, but how it should be done.

V.

The District Court erred in entering each and every conclusion of law.

VI.

The District Court erred in entering judgment for plaintiffs.

VII.

The District Court erred in not entering judgment for defendant.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

United States Attorney

for the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,

District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Statement of Points on Which Defendant Intends to Rely on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage

thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the District Court of the United
States for the District of Oregon:

Defendant, Hugh H. Earle, Collector of Internal Revenue for the District of Oregon hereby designates the entire record in this case to be contained in the record on appeal which is described as follows:

1. All pleadings.
2. Pre-trial Order.
3. Transcript of proceedings of the trial.
4. All trial exhibits.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Appeal to the Circuit Court of Appeals.
8. Statement of Points on Which Plaintiff Intends to Rely on Appeal.
9. This designation.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Designation of Contents of Record on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

ORDER TRANSMITTING EXHIBITS

On motion of defendant and appellant herein, and good cause appearing therefor, it is hereby

Ordered that all of the exhibits and the tran-

script of proceedings in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal in this case.

Dated this 28th day of July, 1949, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES
Civil No. 4134

1948

June 21—Filed Complaint.

June 21—Issued summons—to Marshal.

June 25—Filed summons with return of service.

Aug. 18—Filed answer.

Aug. 23—Entered order setting for pre-trial conference Sept. 27, 1948. Fee.

Sept. 27—Record of pre-trial & order continuing to Oct. 26 for further pre-trial and trial. Fee.

Oct. 19—Filed praecipe U. S. for issuance of subpoenas.

Oct. 19—Filed praecipe U. S. for issuance of subpoena duces tecum.

Oct. 20—Issued subpoenas—to Marshal.

Oct. 20—Issued subpoena duces tecum—to Marshal.

Oct. 21—Entered order canceling pre-trial & trial. Fee.

1948

Oct. 26—Filed (3) subpoenas.

Oct. 26—Filed subpoena Duces Tecum.

1949

Feb. 7—Entered order setting for trial on April 5, 1949. McC.

Mar. 29—Entered order resetting for trial on April 4, 1949, 1:30 p.m. McC.

Apr. 1—Filed praecipe U. S. for subpoenas—issued 4 subpoenas—to Marshal.

Apr. 2—Filed def's motion for subpoena duces tecum.

Apr. 2—Filed & entered order for subpoena duces tecum. McC.

Apr. 2—Issued subpoena duces tecum—to Marshal.

Apr. 4—Filed & entered pre-trial order. McC.

Apr. 4—Record of trial before court; order consolidating with Civ. 4133 & 4135; & order for ptff to submit brief in 2 weeks; deft. 3 weeks thereafter & deft. 1 week thereafter. McC.

Apr. 6—Filed subpoena duces tecum with Marshal's return.

Apr. 11—Filed exhibits 1 to 4 inc.

Apr. 18—Filed ptff's brief.

May 13—Filed deft's brief.

May 20—Entered order that plaintiff prepare Findings of Fact, Conclusions and Judgment. McC.

May 26—Filed & entered Findings of Fact & Conclusions of Law. McC.

1949

May 26—Filed & entered judgment for ptff for \$173.11 with interest at 6% from Oct. 20, 1947. McC.

June 1—Filed cost bill of plntf.

June 25—Filed notice of appeal to the United States Court of Appeals, by U. S.

July 27—Filed designation of contents of record of appeal.

July 27—Statement of points on which defendant intends to rely on appeal.

July 28—Filed & entered order to forward exhibits. McC.

July 28—Filed Transcript of Proceedings April 4, 1949.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, pre-trial order, findings of fact and conclusions of law, judgment, notice of appeal, statement of points, designation of contents of record, order to send original exhibits, transcript of docket entries, and clerk's certificate, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4134, J. N. Conley, M. J. Conley, and Lloyd Babler, dba Babler and Conley, plaintiffs and appellees, and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, is defendant and appellant; that

the said record has been prepared by me in accordance with the said designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the duplicate transcript of testimony and exhibits 1 to 4, inclusive, which went forward with cause Civil 4133, Babler et al vs. Earle, were used jointly with this case and Civil 4135, J. N. Conley et al. vs. Earle.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 1st day of August, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12318. United States Court of Appeals for the Ninth Circuit. Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. J. N. Conley, M. J. Conley and Lloyd Babler, Doing Business as Babler and Conley, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 3, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12319

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY, HARRY
BABLER and LLOYD BABLER, doing business as Babler Brothers,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

NAMES AND ADDRESSES OF ATTORNEYS

HENRY L. HESS,

United States Attorney, and

GENE B. CONKLIN,

Assistant United States Attorney,

Room 506 United States Court House,
Portland, Oregon.

THOMAS R. WINTER,

Special Assistant to Chief Counsel,

Treasury Department,

713 Smith Tower Building,

Seattle, Washington,

For Appellant.

CARL E. DAVIDSON and

CHARLES P. DUFFY,

1525 Yeon Building,

Portland, Oregon,

For Appellees.

In the District Court of the United States for the
District of Oregon

Civil No. 4135

J. N. CONLEY, M. J. CONLEY, HARRY BAB-
LER and LLOYD BABLER, dba Babler
Brothers,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

COMPLAINT

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property, together with penalties and interest thereon, illegally assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Section 24 (5) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 5, United States Code.

II.

During the period from December 1, 1942, to May 1, 1944, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, plaintiffs herein, were engaged

as partners in a general contracting business. As a part of said business, plaintiffs employed certain truck drivers to transport road materials for them and paid said truck drivers at a specified rate.

III.

The Commissioner of Internal Revenue, wrongfully asserting that said truck drivers were not the employees of the plaintiffs but that they were persons engaged in the business of transporting property for hire, assessed a tax against plaintiffs equal to 3% of the amounts so paid by plaintiffs to said truck drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$4,537.15, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$4,537.15, with interest

thereon from the date of payment, and for their costs and disbursements incurred herein.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,

1525 Yeon Building, Portland

4, Oregon,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

ANSWER

The defendant, by his attorney, Henry L. Hess, Esquire, United States Attorney for the District of Oregon, in answer to the complaint, states:

I.

The allegations contained in paragraph I of the complaint are admitted except it is denied that the taxes, together with penalties and interest thereon, were illegally assessed against and collected from the plaintiffs.

II.

The allegations contained in paragraph II of the complaint are denied except it is admitted that during the period from December 1, 1942, to May 1, 1944, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler were engaged as partners in a general contracting business.

III.

The allegations contained in paragraph III of the complaint are denied except it is admitted that transportation taxes, interest and penalties in the total amount of \$4,537.15 were assessed against plaintiffs.

IV.

The allegations contained in paragraph IV of the complaint are admitted.

Wherefore, the defendant prays that plaintiffs' complaint be dismissed with costs to be assessed against the plaintiffs.

HENRY L. HESS,

United States Attorney,

Attorney for the Defendant.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon and one of defendant's attorneys herein, hereby certify that I have made Service of the foregoing Answer on the plaintiff by depositing a duly certified copy thereof in the U. S. Post Office at Portland, Oregon, on the 18th day of August, 1948, enclosed in an envelope with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Building, Portland 4, Oregon, attorneys of record for plaintiff.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed Aug. 18, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause having come on regularly for a pre-trial conference before the Honorable James Alger Fee, one of the Judges of the above-entitled court, at Portland, Oregon, on the 27th day of September, 1948, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the following proceedings were had and done:

Admitted Facts

It appears from the pleadings and the pre-trial proceedings that the following facts are admitted and may be taken and deemed by the court on the trial of this action as established facts therein:

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from December 1, 1942, to May 1, 1944, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain construction work on roads and airports at Redmond, Oregon; Salem, Oregon; and Klamath Falls, Oregon, and in order to carry out said contracts, entered into verbal agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries or other locations to the sites of the roads and airports which they were constructing. The owners of these trucks were paid on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against plaintiffs equal to 3% of the amounts allegedly paid by plaintiffs to said truck owners on an hourly, load or yard-mile basis during the aforesaid period, together with penalties and interest thereon.

IV.

That attached hereto, marked Exhibit "A," and by reference made a part hereof, is a representative form of statement by the plaintiffs to their truck owners. In this instance the truck owner, George Greenberg, owned two trucks, one of which was driven by himself and one by another truck driver. Each truck owner was charged back against the amount due on an hourly, load or yard-mile basis the amount shown thereon as wages to himself and truck drivers, and a 10% payroll insurance item.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue, their claim for refund of \$4,537.15, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Plaintiffs' Contentions

I.

That all of said truck drivers were employees of the plaintiffs and that said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

II.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

Defendant's Contentions

I.

That the truck owners were "persons engaged in the business of transporting property for hire," and, as such were liable for collecting from the plaintiffs the tax imposed by Sections 3475 of the Internal Revenue Code, and for filing returns (on Form 727) for all taxes so collected, and the plaintiffs were liable for paying the tax.

II.

That the drivers of the trucks, to the extent that they drove their own trucks, were not employees of the plaintiffs, but were "persons engaged in the business of transporting property for hire."

III.

That the drivers of the trucks, to the extent that they did not drive their own trucks, were not employees of the plaintiffs, but were the employees of the owner of the truck which they drove.

Issues of Fact and Law to be Determined

I.

Whether the drivers of the trucks, to the extent that they drove their own trucks, were employees of

the plaintiffs, or whether they were persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

II.

Whether the drivers of the trucks, to the extent that they did not drive their own trucks, were employees of the plaintiffs or employees of the owners of the trucks, and the owners were persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

III.

Whether plaintiffs are entitled to a refund of the taxes, penalties and interest paid by them as prayed for in the complaint herein.

Exhibits

Plaintiffs introduced in evidence as their only pretrial exhibit certain work sheets showing, during the period involved, the names of the owners of the trucks and the number of trucks owned by them, amounts paid on an hourly, load or yard-mile basis, less deductions claimed to be paid as wages to drivers of the trucks and other adjustments and settlements made with truck owners; defendant introduced no exhibits at the pre-trial conference.

It is agreed by the parties that this pre-trial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice.

The court finding that the foregoing clearly and accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pre-trial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the court.

Dated this 4th day of April, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ CHARLES P. DUFFY,
of Attorneys for Plaintiffs.

/s/ THOMAS R. WINTER,
of Attorneys for Defendant.

EXHIBIT "A"

Babler Bros.
Contractors
4617 S. E. Milwaukie Ave.
Portland 2, Oregon

TO George Greenberg DR.
Tillamook, Oregon

Oct. 6, 1945

Crater Lake-Fort Klamath Timber Access Road
Contract #2735.

Truck #1	4139½	yard mile haul @ .09¢ per yd. mile	\$372.55
Truck #3	3866½	" " " @ .09¢ " " "	347.99
Total Credits.....			\$720.54

Less:			
	Payroll—Greenberg	\$103.95	
	Webb	111.10	
		<hr/>	
		215.05	
	10% payroll insurance	21.50	\$236.55
		<hr/>	
Final payment	Amount of this check		\$483.99
	Paid by Check #717		
	October 6, 1945		

Voucher 208

[Endorsed]: Filed April 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McColloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon; and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein; and

The court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised, does make the following

Findings of Fact

I.

Plaintiffs instituted this action to recover taxes on amounts paid for the transportation of property, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from December 1, 1942, to May 1, 1944, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain construction work on roads and airports at Redmond, Oregon, Salem, Oregon, and Klamath Falls, Oregon, and in order to carry out said contracts entered into verbal lease agreements with various owners of trucks for the purpose of transporting bulk construction material from stock piles, quarries and other locations to the sites of the roads and airports which they were constructing. The owners of these trucks were paid a rental on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against the plaintiffs equal to 3% of the amounts paid by plaintiffs to said truck owner-operators and drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs on October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$4,537.15, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

V.

All of said truck drivers, whether they were truck owners or not, were subject to the will and control of the plaintiffs, not only as to what should be done but how it should be done, and plaintiffs had the right to discharge said truck drivers, whether truck owners or not, at any time.

From the foregoing Findings of Fact, the court draws the following

Conclusions of Law

I.

That all of said truck drivers, whether truck owners or not, were employees of the plaintiffs during the period in question.

II.

That said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

III.

That the hauling of the bulk construction materials from stock piles, quarries and other locations to the sites of the roads and airports which they were constructing did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

IV.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

V.

That by reason of the foregoing plaintiffs are entitled to recover judgment against defendant for

the sum of \$4,537.15, together with interest thereon at the rate of 6% per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

Receipt of a copy of the within proposed Findings of Fact and Conclusions of Law is hereby acknowledged this 25th day of May, 1949.

/s/ GENE B. CONKLIN,
of Attorneys for Defendant.

[Endorsed]: Filed May 26, 1949.

In the District Court of the United States
for the District of Oregon
Civil No. 4135

J. N. CONLEY, M. J. CONLEY, HARRY
BABLER and LLOYD BABLER, dba Babler
Brothers,

Plaintiffs,

v.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

JUDGMENT

This cause, having come on regularly for trial without a jury before the Honorable Claude Mc-

Colloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein, and

The court having considered fully all matters of fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Fact and Conclusions of Law have heretofore been signed by the court and entered of record on the day of May, 1949,

Now Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$4,537.15, together with interest thereon at the rate of 6 per cent per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE
UNITED STATES COURT OF APPEALS

Notice is hereby given that Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 26, 1949 in favor of the plaintiffs.

Dated this 25th day of June, 1949.

HENRY L. HESS,

U. S. Attorney

For the District of Oregon.

/s/ GENE B. CONKLIN,

Asst. U. S. Attorney.

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Notice of Appeal to the United States Court of Appeals by depositing in the United States Post Office at Portland, Oregon, on the 25th day of June, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid addressed to Carl E. Davidson and Charles P. Duffy,

Attorneys at Law, 1525 Yeon Building, Portland 4,
Oregon, Attorneys of record for Plaintiffs.

/s/ GENE B. CONKLIN,
Asst. U. S. Attorney.

[Endorsed]: Filed June 25, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The Defendant, having taken appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment rendered by the District Court of the United States for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

The District Court erred in finding that plaintiffs entered into lease agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries and other locations to the sites of the roads and airports which they were constructing.

II.

The District Court erred in finding that plaintiffs entered into similar agreements with the truck owners for the purpose of transporting some of their employees to the site of the construction job.

III.

The District Court erred in finding that the truck owners were paid a rental on an hourly, load or yard-mile basis.

IV.

The District Court erred in finding that all of the truck drivers were subject to the will and control of the plaintiffs not only as to what should be done, but how it should be done.

V.

The District Court erred in entering each and every conclusion of law.

VI.

The District Court erred in entering judgment for plaintiffs.

VII.

The District Court erred in not entering judgment for defendant.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

U. S. Attorney

for the District of Oregon.

/s/ GENE B. CONKLIN,

Asst. U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify

that I have made service upon the plaintiffs of the foregoing Statement of Points on Which Defendant Intends to Rely on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN,

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the District Court of the United States for the District of Oregon:

Defendant, Hugh H. Earle, Collector of Internal Revenue for the District of Oregon hereby designates the entire record in this case to be contained in the record on appeal which is described as follows:

1. All pleadings
2. Pre-trial Order
3. Transcript of proceedings of the trial
4. All trial exhibits
5. Findings of Fact and Conclusions of Law

6. Judgment

7. Notice of Appeal to the Circuit Court of Appeals

8. Statement of Points on Which Plaintiff Intends to Rely on Appeal

9. This designation.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

U. S. Attorney

for the District of Oregon.

/s/ GENE B. CONKLIN,

Asst. U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Designation of Contents of Record on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

ORDER TRANSMITTING EXHIBITS

On motion of defendant and appellant herein, and good cause appearing therefor, it is hereby

Ordered that all of the exhibits and the transcript of proceedings in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal in this case.

Dated this 28th day of July, 1949, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

Civil 4135

1948

June 21—Filed complaint

June 21—Issued summons—to Marshal

June 25—Filed summons with return of service

Aug. 18—Filed answer

Aug. 23—Entered order setting for pre-trial Sept.
27, 1948—Fee

Sept. 27—Record of pre-trial and order continuing
to Oct. 26 for further pre-trial and trial—
Fee

1948

Oct. 19—Filed praecipe U. S. for subpoena duces tecum

Oct. 19—Filed praecipe U. S. for issuance of subpoenas

Oct. 20—Issued subpoena duces tecum—to Marshal

Oct. 20—Issued subpoenas—to Marshal

Oct. 21—Entered order cancelling pre-trial and trial dates—Fee

Oct. 26—Filed (3) subpoenas

Oct. 26—Filed subpoena duces tecum

1949

Feb. 7—Entered order setting for trial on April 5, 1949—McC.

Mar. 29—Entered order resetting for trial on April 4, 1949, 1:30 p.m.—McC.

Apr. 1—Filed praecipe U. S. for subpoenas—issued 4 subpoenas—to Marshal

Apr. 2—Filed def's motion for subpoena duces tecum

Apr. 2—Filed and entered order for subpoena duces tecum—McC

Apr. 2—Issued subpoena duces tecum—to Marshal

Apr. 4—Filed and entered pre-trial order—McC

Apr. 4—Record of trial before court; order consolidating with Civ. 4133 and 4134 and order that ptff submit brief in 2 weeks; def't 3 weeks thereafter and ptff 1 week thereafter—McC

Apr. 6—Filed subpoena duces tecum with Marshal's return

1949

Apr. 11—Filed exhibits 1 to 4 inc.

Apr. 18—Filed ptff's brief

May 13—Filed deft's brief

May 20—Entered order that ptff prepare and submit Findings, Conclusions and Judgment—McC

May 26—Filed and entered Findings of Fact and Conclusions of Law—McC

May 26—Filed and entered Judgment for ptff for \$4,537.15 with interest at 6% from Oct. 20, 1947—McC

June 1—Filed cost bill of ptff

June 25—Filed notice of appeal to the United States Court of Appeals, by U. S.

July 27—Filed designation of contents of record on appeal

July 27—Filed Statement of points on which defendant intends to rely on appeal

July 28—Filed and entered order to forward exhibits—McC

July 28—Filed Transcript of Proceedings April 4, 1949

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, pre-trial order, findings of fact and conclusions of law, judgment, notice of appeal,

statement of points, designation of contents of record, order to send original exhibits, transcript of docket entries, and clerk's certificate, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4135, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, dba Babler Brothers, plaintiffs and appellees, and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, is defendant and appellant; that the said record has been prepared by me in accordance with the said designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the duplicate transcript of testimony and exhibits 1 to 4 inclusive, which went forward with cause Civil 4133, Babler vs. Earle, were used jointly with this case and Civil 4134, J. N. Conley et al. vs. Earle.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 1st day of August, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12319. United States Court of Appeals for the Ninth Circuit. Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, doing business as Babler Brothers, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 3, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States District Court, District of Oregon
Civil No. 4133

LLOYD BABLER, RICHARD BABLER, JAMES
A. POLLOCK and J. H. SCHESTAK, Doing
Business as Lloyd Babler,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

Civil No. 4134

J. N. CONLEY, M. J. CONLEY and LLOYD
BABLER, Doing Business as Babler and
Conley,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

Civil No. 4135

J. N. CONLEY, M. J. CONLEY, HENRY BAB-
LER and LLOYD BABLER, Doing Business
as Babler Brothers,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

Portland, Oregon
Monday, April 4, 1949

1:30 o'Clock P.M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Charles P. Duffy, of Attorneys for Plaintiffs.

Mr. Gene B. Conklin, Assistant United States Attorney, and Mr. Thomas H. Winter, Special Assistant to the United States Attorney, Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS OF TRIAL

Mr. Duffy: The plaintiff is ready, your Honor, or are ready, I should say.

Mr. Winter: The defendant is ready, your Honor. I think it is the same defendant in each case. Is that right?

Mr. Duffy: That is right.

Mr. Winter: I would suggest that inasmuch as these cases involve just a continuing period, with different ownerships, that they be consolidated. I think that was understood before.

Mr. Duffy: Yes.

The Court: Stipulated and so ordered.

Mr. Duffy: If the Court please, we have agreed upon a form of pre-trial order in each of these three cases. We have here for trial today three cases:

Civil No. 4133 in which Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, [2*] doing business as Lloyd Babler, are plaintiffs and Hugh H. Earle as Collector of Internal Revenue for the District of Oregon is defendant; Civil No. 4134 in which J. N. Conley, M. J. Conley and Lloyd Babler, doing business as Babler & Conley, are plaintiffs and in which we have the same defendant; and Civil No. 4135 in which J. N. Conley, M. J. Conley, Henry Babler and Lloyd Babler, doing business as Babler Brothers, are plaintiffs, and we have the same defendant, Hugh H. Earle, Collector of Internal Revenue. These have been consolidated for trial because they involve basically the same question in every suit. The only reason we have three actions here, instead of one, is that the membership in the partnership changed from time to time. Civil No. 4135 involves the period from December 1, 1942, to May 1, 1944; Civil No. 4134 involves the period from May 1, 1944, to April 1, 1945; and Civil No. 4133 involves the last period from April 1, 1945, to December 31, 1945. All of these suits are for refund of transportation taxes.

The Court: What are transportation taxes?

Mr. Duffy: Transportation taxes, your Honor, are imposed under Sections 3475 and 3459 of the Internal Revenue Code. Perhaps I should read the pertinent part of the applicable code sections, Title 26, Section 3475——

* Page numbering appearing at top of page of original Reporter's Transcript.

The Court: Let me know what the statute is. Just tell me what the statute is.

Mr. Duffy: It imposes a 3 per cent tax on the amount paid [3] for transportation. However, that is limited to persons who are engaged in the business of transporting property for hire.

The Court: You mean all of these commercial trucking people pay a transportation tax?

Mr. Duffy: In most instances they do pay it. They collect it from the person shipping the goods. In other words, if you had your own property being shipped down to the beach——

The Court: Household goods?

Mr. Duffy: Household goods—the shipper would collect from you, in addition to the freight, a tax of 3 per cent which he would remit to the Collector.

The Court: Based on what?

Mr. Duffy: Based on the usual rate.

The Court: Then what are these witnesses here for?

Mr. Duffy: The statute says the tax shall apply only to amounts paid to persons engaged in the business of transporting property for hire, and it has been the ruling of the Bureau of Internal Revenue that payments in a situation in which the transportation is being done by employees of the person are not subject to the tax. We have the question whether these particular individuals were employees of the plaintiffs during these times or whether they were independent contractors or employees of independent contractors.

The Court: What is your situation, then, Mr. Winter?

Mr. Winter: It is simply, your Honor, that these owners [4] of trucks were independent contractors; they were hauling gravel for the plaintiff corporation and plaintiff corporation was required to pay a transportation tax on the hauling of gravel. All of these contractors held licenses from the State of Oregon as contractors for hire and they hauled and transported gravel in two instances and dirt in dump trucks, and plaintiff became liable for transportation taxes and now they are suing for a refund. I do not mean the corporations; I mean the individuals doing business as Babler Brothers.

The Court: What is the factual situation, Mr. Duffy? What was the operation?

Mr. Duffy: The plaintiffs are general contractors, your Honor, and during this period of time they were engaged in constructing and re-servicing roads and highways and airports at Redmond and Klamath Falls and Salem.

The Court: Yes.

Mr. Duffy: In order to get the jobs done, they, as we say, employed contractors who in some instances owned their own trucks and drove their own trucks on the job. We contend they were employees of the plaintiffs inasmuch as during this time they were carried under Social Security, employment tax, or unemployment tax, I should say, and everything of that sort. The Government contends they were independent contractors and were persons engaged in transporting property for hire.

The Court: In the usual cases we have had under various [5] Federal statutes the positions of the parties have been reversed.

Mr. Duffy: Yes.

The Court: The Government has claimed they were employees, like in log hauling.

Mr. Winter: Of course, the Supreme Court has definitely decided that question, in our opinion. In this particular instance these contractors hauled gravel for nine, ten or more miles; not hauling on this property.

The Court: Is this the same as log hauling?

Mr. Winter: There are what you call independent log haulers who contract to haul logs, but there are no logs involved here.

The Court: But the question is the same, isn't it?

Mr. Winter: Well, your Honor, primarily, there has been some distinction made, whether or not it is still a continuation of the logging operation, from the woods up to the dump, as to whether or not that is still a part of the logging operation, which would be different from this case. We do not have a situation like that.

The Court: Has this question been tried in other courts?

Mr. Winter: We have never had a case involving hauling in Oregon. There was a case in Georgia involving the construction of an airport.

The Court: Are there any cases the other way, Mr. Duffy? [6]

Mr. Duffy: Both the cases Mr. Winter has in mind in the Supreme Court are in our favor, your Honor.

Mr. Winter: In the Georgia case it was all confined to hauling within the airport, within the area, and there was no general hauling out on the roads and highways. In other words, in that operation it would not have been necessary for them to have had any PUC license. We think the cases are entirely distinguishable. There are no cases on the facts that we have present in these cases.

The Court: All right; call your witnesses.

Mr. Duffy: In addition to this employer and employee question, we also contend that this is not transporting property for hire in the sense it is just a part of the integral operations of the plaintiffs, and that this is not transporting property within the meaning of the statute.

The Court: Put a witness on the stand.

JOSEPH H. SCHESTAK

was thereupon produced as a witness on behalf of Plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. You are J. H. Schestak? A. Yes, sir.

Q. You are one of the plaintiffs in case Civil No. 4133 in which Lloyd Babler, Richard Babler, James

(Testimony of Joseph H. Schestak.)

A. Pollock and yourself are plaintiffs, doing business under the name of Lloyd Babler?

A. Yes.

Q. Did you have any connection with partnership before this time?

A. Well, I did have when it was known as Lloyd Babler and since we reorganized we called it Babler Brothers.

Q. When did you first start working for this group which was known by different names at various times?

A. Well, originally Babler Brothers went to work in 1933.

Q. In what capacity have you worked with them?

A. I was timekeeper and bookkeeper.

Q. Starting December 1, 1942, which is the first date involved in these proceedings, what was your position with Babler Brothers?

A. I was the general office bookkeeper.

Q. You were the general office bookkeeper?

A. Yes.

Q. Where was that office?

A. Located in Portland, on Milwaukee Avenue, 4617 Southeast Milwaukee Avenue.

Q. What were your duties as general bookkeeper and office manager?

A. Well, I wrote the checks in payment of all these invoices [8] covering trucking and also kept the accounts.

(Testimony of Joseph H. Schestak.)

Q. What was the nature of Babler Brothers' business at that time?

A. The beginning of 1942 and during 1943 they were constructing the Redmond Air Base.

Q. Did they do any other work during that period of time other than the construction of the Redmond Air Base?

A. During 1943 I don't believe they did. I don't believe there was any other work. There might have been a small job or two, but I just don't recall.

Q. The principal work during that period, December 1, 1942, to May 1, 1944, was the construction of the Redmond Air Base?

A. That is right.

Q. Approximately how many employees did you have there? A. Oh, around 300.

Q. 300? A. Yes.

Q. During the second period, from May 1, 1944, to April 1, 1945, you held the same position as office manager? A. Yes.

Q. What was the principal work done by the partnership during that period?

A. Highway construction.

Q. Where was that highway construction being done? A. In the State of Oregon. [9]

Q. In the State of Oregon?

A. Mostly in the State of Oregon, yes, sir.

Q. For the last period from April 1, 1945, to De-

(Testimony of Joseph H. Schestak.)

cember 31, 1945, you had the same position except you were also a partner at this time?

A. That is right.

Q. What was the nature of the partnership business during this last period?

A. Highway construction, re-servicing and oiling highways.

Q. Were any airports constructed during this period?

A. The Salem Air Base. We built the Salem Air Base. That is in 1942, though.

The Court: I didn't get it. You say in the third period the Salem Air Base was constructed?

A. 1943.

Mr. Winter: That was in the first period.

A. The first period, yes.

Q. (By Mr. Duffy): Would you mind stating just exactly what your duties were as office manager during all of these periods?

A. Well, I had charge of the general books. The field timekeeper, he prepared the invoices covering truck rentals and mailed them to our office and I wrote the checks and the checks were returned to the field office.

Q. The field timekeeper sent in the time and you wrote the checks based upon that? [10]

A. Yes.

Q. You kept central books, did you?

A. Oh, yes.

Q. Who was your timekeeper?

(Testimony of Joseph H. Schestak.)

A. Mr. Shurte.

Q. Mr. Roy Shurte was your timekeeper on the job?

A. Yes.

Q. Did you, at my request, compile, under your supervision, figures showing the names of various truck owners and the time they worked?

A. Yes, I have.

Q. You have been handed Plaintiff's Pre-Trial Exhibit No. 1. I will ask you if that constitutes the figures that you have compiled?

A. Yes, sir; they are.

Q. Showing the names of the truck drivers and the manner in which they were paid and the periods during which they worked?

A. That is correct.

Mr. Duffy: I will offer Plaintiff's Pre-Trial Exhibit 1 in evidence.

Mr. Winter: May I ask the witness one or two questions on this, your Honor?

The Court: Yes.

Q. (By Mr. Winter): Up at the top of that exhibit you have "Truck Rental, January 1, 1943, to May 1, 1944." Where did you [11] take those words "Truck Rental" from? *From record* did you take that?

A. Well, I guess our invoices are marked that way.

Q. Your invoices are marked?

A. The original files.

Q. What? A. The original files.

(Testimony of Joseph H. Schestak.)

Q. You mean the invoices that you give to the truck operators?

A. The one that is attached to our voucher. We attach the original invoice to the voucher when we pay and usually the truck owner gets a copy of it.

Q. Is that the invoice you refer to, Exhibit A, which is attached to the stipulation or pre-trial order?

A. That is right. It is a copy.

Q. Where does that say anything about rental on there?

A. Well, this particular one does not.

Q. That particular one does not? A. No.

Q. Do you have any original invoices with you, here? A. I have a copy.

Q. May I see it? A. I have a copy.

The Court: This will be cross-examination when you get to it.

Mr. Winter: What I am trying to get at is whether or not [12] these records are copies, if this "Truck Rental" is copied from something. I want to know where they have carried "Truck Rental" on the records.

The Court: Mr. Duffy can tell you quicker.

Q. (By Mr. Winter): Why did you carry it as "Truck Rentals"? Is that because you contend it was truck rentals in the issues before this Court?

A. No. I said I could furnish the original voucher.

(Testimony of Joseph H. Schestak.)

Q. Do you have the original voucher with you? That is what I want to know.

A. Yes. They are down at the office.

Q. (By Mr. Duffy): Let me ask you this: This caption you put at the top of Plaintiff's Exhibit No. 1 is just a means of identifying these particular figures? A. That is right.

Q. (By Mr. Winter): Does the exhibit show the name of each individual truck driver who did not own his own truck?

A. Those are truck owners.

Q. Well, the truck owner furnished more than one truck, didn't he? Is that shown on the exhibit? A. I rather think it is.

Q. But it does not have the names of any of the truck owners' drivers who were on the trucks?

A. Well, no, I don't think that sheet has, but the drivers' names are on the original invoices. [13]

Q. The original invoice, Exhibit A?

A. That is right.

Q. This just includes all truck owners who furnished one or more trucks?

A. That is right, yes.

Q. In hauling and in construction?

A. Yes, sir.

Mr. Winter: I think that is all. We have no objection.

(Compilation showing names of truck owners and time worked, etc., thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of Joseph H. Schestak.)

Mr. Winter: Of course, we don't admit the conclusion that they were truck owners.

Q. (By Mr. Duffy): How did you compute the amounts of the checks to be sent to the individual truck owners?

A. Well, it all depended on how they worked. Some worked by the hour. We paid them \$2.00 an hour or \$2.40 an hour. They received that as payment in full. That—Others were deducted the drivers' time, plus the payroll insurance.

Q. You paid the amounts sometimes based on the hours for which the trucks were rented, sometimes on the basis of the amounts hauled and sometimes on the basis of the distances hauled?

A. That is right.

Q. Just how did you compute that? [14]

A. There are various methods of doing it. I just looked up the yard mile haul and computed it on the distances. I think it calls for 9 cents a yard mile.

Q. By "yard mile haul" you mean hauling so many yards so many miles?

A. That is right.

Q. What deductions were made from the amount of the check sent to the truck owner?

A. Well, one per cent for Social Security, three per cent unemployment and whatever rate the State Industrial Accident insurance was. I believe on that particular one it was \$6.00 a hundred less 10 per cent.

(Testimony of Joseph H. Schestak.)

Q. You mean that was the rate of the State Industrial Accident insurance?

A. That is right.

Q. Were the wages of the driver deducted from the amount of the truck rental?

A. Yes, but not in all cases.

Q. In addition to that the amount which you term "payroll insurance" was also deducted?

A. That is right.

Q. Did you remit these amounts to the Collector of Internal Revenue, the amounts which you deducted for unemployment tax and Social Security?

A. Yes, sir. [15]

Q. During all of these times these drivers were carried as your employees, is that correct?

A. That is right.

Q. And you paid Social Security taxes?

A. That is right.

Q. What payments were also made to the State of Oregon?

A. Unemployment insurance and State Industrial Accident, payroll insurance.

Q. When did the Government first assert this transportation tax against the company?

Mr. Winter: That is objected to as irrelevant and immaterial.

The Court: Answer.

Mr. Winter: When Congress passed the Act imposing it, is that what you mean?

Mr. Duffy: No. I think we can agree that the tax was made effective December 1, 1942.

(Testimony of Joseph H. Schestak.)

Mr. Winter: That is when the Act took effect, when Congress imposed the transportation tax.

Mr. Duffy: I am asking the witness when the Government asserted the transportation taxes against this company.

Mr. Winter: What do you mean by "asserted"? You mean the first time we found out they had not been deducting them?

Mr. Duffy: The first time they made an assessment.

Mr. Winter: I cannot see the materiality. What do you [16] expect to prove here? I don't see the materiality of it.

Mr. Duffy: Let me explain, your Honor. I am making the point here that the Government has, for many years, collected Social Security taxes, unemployment taxes and all during this time but never refunded them and now, after all this time, they also assess this transportation tax.

Mr. Winter: What does that have to do with whether or not transportation taxes are legally due and owing here?

The Court: That will be for determination. Go on and answer the question.

A. I believe the date is on there.

Mr. Winter: A further point: Certainly these truck drivers are employees of the owners of the trucks and certainly Social Security tax is due on their wages where they are working for somebody else.

(Testimony of Joseph H. Schestak.)

Q. (By Mr. Duffy): Was Social Security and unemployment deducted from the truck owners who drove their own trucks as well as the other drivers who didn't drive their own trucks? A. Yes.

Q. I will ask you again: When did the Government first assess transportation taxes?

A. I haven't the date here, but it is in my file there. There is a copy of their audit.

Mr. Winter: The pre-trial order shows when it was paid, if the Court please. The taxes were paid on notice and demand. [17]

A. Well, it was paid on October 20, 1947.

Q. (By Mr. Duffy): It was asserted just prior to that time? A. Yes, sir.

Q. The company thereafter paid the taxes?

A. Yes.

Q. And thereafter you filed a claim for refund which was rejected?

A. Yes, that is right.

Mr. Duffy: That is all.

Cross-Examination

By Mr. Winter:

Q. Just referring to Exhibit A attached to the pre-trial order—do you have any of the statements that you gave to all these truck owners when you made settlement with them? A. Yes.

Q. Do you have one with you? A. Yes.

Q. Let us have the original on your own stationery.

A. I have three copies here, one for a fellow by the name of Case.

(Testimony of Joseph H. Schestak.)

Q. What Case is that? Is he in the courtroom?

A. Al M. Case.

Mr. Winter: I don't know him. Will you stand up, Mr. Case?

Q. Are you acquainted with Mr. Case?

A. No. [18]

Q. May I see the statement? A. Yes, sir.

Q. Let's look at the representative statement which is attached as Exhibit A to the stipulation. The contract price with Mr. Greenberg, for instance, was 9 cents a yard mile. A. Yes.

Q. Wasn't that the contract price that you agreed to pay Mr. Greenberg?

A. Well, we didn't have the contact with him.

Q. That was your verbal understanding, though?

A. That is right.

Q. In other words, he was to get 9 cents per yard mile? A. That is right.

Q. And he furnished, according to the statement, two trucks? A. That is right.

Q. And a driver by the name of Webb?

A. That is right.

Q. Webb had been working for him before that time?

A. I don't know enough about his operation.

Q. According to the statement, Mr. Greenberg hauled 4,139½ yard miles of dirt or gravel or rock, whatever it was, and was entitled to \$372.55?

A. That is correct.

Q. Then he hauled 3,868½ yard miles at 9 cents?

(Testimony of Joseph H. Schestak.)

A. That is right. [19]

Q. \$347.99? A. Correct.

Q. A total of \$720.54? A. Yes.

Q. In the settlement you made with Mr. Greenberg you deducted \$103.95 which you designate on there as payroll for Greenberg, owner of the truck?

A. That is right.

Q. That was the union scale or the OPA scale at that time? A. Correct, yes.

Q. Then you deducted \$111.10 for Webb.

A. That is right.

Q. Or a total \$215.05? A. Yes.

Q. Then you deducted 10 per cent payroll insurance. How did you say you made up that payroll insurance?

A. Well, let's see. That covers payroll—

Q. Well, that covers one per cent Social Security? A. That is right.

Q. Then it covers three per cent unemployment?

A. That is right.

Q. What per cent did it cover for bookkeeping?

A. None.

Q. Well, what is the difference? What is the additional—

A. One per cent Social Security, three per cent unemployment, [20] payroll insurance, State Industrial Accident is six per cent minus ten, and 5.4; that is 9.4, and we paid 70 cents under liability insurance covering the trucks. We carried blanket insurance, a blanket policy covering all rented trucks.

(Testimony of Joseph H. Schestak.)

Q. You did not own any trucks. Babler Brothers did not own any trucks of their own?

A. Oh, yes.

Q. At that time?

A. Yes, at various times.

Q. I am talking about in 1943. A. Yes.

Q. How many trucks did you own?

A. I don't remember. I haven't checked into that. I just don't know.

Q. Well, you owned your own trucks?

A. That is right.

Q. But most of the trucks you got elsewhere?

A. Right.

Q. Most of the hauling you contracted for?

A. Yes.

Q. Then, what you designate as 10 per cent payroll insurance, that included Social Security?

A. That is right.

Q. You mailed checks for the unemployment and Social Security to the Federal Government and to the State? [21]

A. That is right.

Q. But you deducted it from the owners of the trucks on their contracts and charged them with it, didn't you?

A. Deducted it from the statement here, yes.

Q. You deducted it from the amount that you agreed to pay them for hauling, didn't you?

A. That is right.

Q. In fact, they paid it out of the amount which

(Testimony of Joseph H. Schestak.)

you had agreed to pay them at so much a mile, didn't they? A. Well, I guess so.

Q. Did you deduct any amount for transportation tax and pay it? A. No.

Q. You did not pay any transportation tax?

A. No, sir.

Q. When did you pay any unemployment or Social Security except by deducting it from the amount you paid the truck owner?

A. All their employees was on the payroll and were covered in their payroll.

Q. For every truck driver you kept a record of the hours that these truck drivers were working? A. That is right.

Q. Did you deduct from the other employees, your own truck drivers, the Social Security and withholding tax—I mean the Social Security and unemployment tax?

A. How do you mean that? [22]

Q. Did you deduct from your own truck drivers, driving your own trucks, Social Security?

A. No.

Q. You don't show that on that statement?

A. You don't furnish them a statement. You just give them a paycheck.

Q. You just gave them the same rate of pay; they would just get wages as drivers?

A. That is right.

Q. They don't get any statement?

A. No.

(Testimony of Joseph H. Schestak.)

Q. When the company furnished the truck owners gasoline and oil or made repairs to the trucks, was that likewise deducted from the amount they were to receive on a yard mile or hourly basis.

A. Yes, I think so.

Q. In other words, they were to receive 9 cents per yard mile less the cost of wages in operating the truck?

A. Yes, and oil.

Q. And gasoline and oil?

A. Yes.

Q. And the taxes applicable, Social Security or unemployment?

A. That is right.

Q. In other words, if I furnished a truck and went to work on that job, you intended to deduct from my pay, to deduct from me [23] Social Security taxes on my wages?

A. You furnish the truck?

Q. Yes.

A. Well, it all depends on what rate of pay we pay you. In the case of Mr. Case, we didn't deduct anything. We just paid him \$2.40 an hour.

Q. \$2.40 an hour?

A. Yes. We paid all Social Security.

Q. You just paid him \$183.60.

A. So much an hour.

Q. With respect to W. R. Campbell, you deducted one per cent for Social Security?

A. Yes.

Q. And you deducted three per cent for State Unemployment Insurance and charged it against him, and State Industrial Insurance, six per cent, less ten per cent. \$68.58.

A. That is right.

(Testimony of Joseph H. Schestak.)

Q. You did not deduct any public liability and property damage insurance?

A. Well, not on that particular one we didn't, no.

Q. I say, you didn't as against Mr. Campbell?

A. That is right.

Q. This was for the period ending 8/5/43. How many trucks did Mr. Campbell have?

A. Oh, I don't know; two or three. [24]

Q. Three, four or five trucks?

A. That is right.

Mr. Winter: I think that is all.

Redirect Examination

By Mr. Duffy:

Q. As I understand your testimony, then, the manner of paying the men was not uniform?

A. That is correct.

Q. How did they arrive at that particular rate for individual owners?

A. It all depends on where he worked. Case worked on the Salem Air Base and naturally——

Mr. Winter: We are going to object to any attempt to vary the terms of this written instrument. I think we should have the books and records if there is going to be any attempt to vary the terms of our stipulation. If there is some difference than what they have done on Greenberg, we want to know.

Q. (By Mr. Duffy): Were your books inves-

(Testimony of Joseph H. Schestak.)

tigated very thoroughly by Mr. Meuller who is sitting over here, the Deputy Collector?

A. Mr. Meuller was over there, yes. He checked some of them.

Q. He was advised as to the whole matter of paying these drivers?

A. I think so. I think we discussed that.

Q. Mr. Meuller assures me he is an agent; he is not a Deputy Collector. He was advised how you carried the employees on the payroll? [25]

A. Yes, sir.

Q. Those that were working on jobs, in driving trucks? A. Correct.

Q. The owners driving trucks were carried—you carried them uniformly on the payroll?

A. Yes.

Q. I understood the usual practice was for drivers who had more than one truck to bring somebody else along. You were not on the job at all, yourself, though?

A. I wasn't on the job, no. I was in the Portland office.

Q. I understand some of the men were paid at the rate of \$2.00 an hour?

A. I think so, yes.

Q. But 10 per cent was deducted from that?

A. Not on the hourly basis; I don't think so.

Q. 10 per cent of the wages, deducted as payroll insurance?

(Testimony of Joseph H. Schestak.)

A. I just don't remember that. It is quite a number of years ago.

Mr. Winter: Let us have the records here if we going to get at these things.

Q. (By Mr. Duffy): This method of paying the truck drivers and truck owners so much for their trucks less a percentage is just the same as paying the net rental anyway.

Mr. Winter: Object to that.

(Question read.) [26]

The Court: Answer.

A. Yes, sir.

Mr. Duffy: That is all.

Recross-Examination

By Mr. Winter:

Q. What do you mean, just the same?

A. Well, these rates cover truck owners. They are figured by the superintendent in charge and, naturally, he pays which is most advantageous to the job, to the company, so therefore the rate would be the same. We could pay this fellow and not deduct his wages and pay him 8 cents a yard mile.

Q. That was not the agreement?

A. Well——

Q. Your agreement was 8 cents if he brought his truck and furnished the driver?

A. 9 cents.

Q. Wasn't your agreement you were going to pay him 9 and furnish the driver? 9 cents a yard?

(Testimony of Joseph H. Schestak.)

A. If he did not have a driver, we furnished the driver.

Q. If he furnished the driver, then you paid him 9? A. That is right.

Q. Then you would deduct from the amount of the check the amount that you would give to the driver? A. That is right.

Q. You carried the driver's name on your payroll? [27] A. Correct.

Q. But you charged all Social Security taxes to the owner of the truck and all other expenses to the owner of the truck, didn't you?

A. Yes, sir.

Q. Including the wages?

A. That is right.

Q. Then all you did was to keep books for the truck owners, as far as the employee was concerned, isn't that right?

A. Well, this particular one, yes.

Q. That was the usual custom of contractors when they would make contracts with truck owners, wasn't it?

A. No, I wouldn't say that.

Q. You would not say that? A. No.

Q. You don't know that is the common practice?

A. No, I don't.

Q. At least that is the way Babler Brothers handled it?

A. That is the way we handle it, yes.

Q. Everything was classed either on an hourly

(Testimony of Joseph H. Schestak.)

basis or a per-mile basis or on a combination of the two? A. Yes.

Q. Some of these hauls were long hauls, were they not, where they were hauling gravel from quarries?

A. Well, of course, I wasn't on the job. I don't know just [28] how long.

Q. From your knowledge of the statements that you prepared, in other words, they were from one and a half to, say, nine or ten miles? A. Yes.

Q. Hauling gravel to the job, or crushed rock or whatever the material was they wanted to be hauled? A. That is right.

Q. Babler did not have enough trucks or equipment of his own to do this work and complete the contract? A. That is right.

Q. Did you have lots of gravel hauled by rail?

A. No, none.

Q. You usually used trucks for the hauling of it?

A. Yes. Rock usually is furnished in stock piles by the state. All we did is considered on the highway.

Q. You would haul it from the stock pile to the job? A. Yes, sir.

Q. I think you testified as to what jobs—I think you are probably more familiar with the jobs that were being done. You said generally you only had the airport in 1943, is that right, the Redmond Airport? A. I think so.

(Testimony of Joseph H. Schestak.)

Q. What? A. I think so. [29]

Q. To refresh your memory, for the period November, 1942, through 1944, you had the Redmond Airport? A. Yes.

Q. That was a construction job of an Army Air Base, wasn't it? A. That is right.

Q. There were a lot of cinders to be hauled to the job? A. Yes.

Q. Those were hauled some five or six miles?

A. Something like that, yes.

Q. Most of that hauling was done on a load basis of \$2.00 or \$2.15 a load, if you recall?

A. That is right.

Q. Then you also had the air base at Salem?

A. Yes.

Q. That was during that period of time?

A. That is right.

Q. The hauling of rock, was it? You had rock hauled by the truck owners? A. Yes.

Q. From the quarry to the job site?

A. Yes.

Q. So much an hour or so much a mile yard?

A. We paid those fellows by the hour, so much an hour, \$2.40 an hour.

Q. For hauling that? [30]

A. No deductions.

Q. That was for truck and driver?

A. That is right.

Q. You also had one job for Eldon. That was a small job?

(Testimony of Joseph H. Schestak.)

A. That is right, a real small job; a subcontract.

Q. That was from stock piles on the State highway?
A. Yes.

Q. The Ochoco-Veazie Creek job, that was a small job?
A. Yes.

Q. I think you told the investigating officer you didn't remember what was hauled or where to or where from?

A. At that time that Mr. Meuller was there I told him I just didn't remember.

Q. Then you also had the rifle range job?

A. Yes.

Q. That was hauling rock?

A. That is right.

Q. From stock piles?
A. Yes.

Q. Then you worked at Klamath Falls, Oregon?

A. Oh, yes.

Q. That was performed under a subcontract with Morrison-Knudsen?
A. Correct.

Q. Then you had these truck owners haul on that job?
A. Yes. [31]

Q. That job went over into the next period?

A. I think so. I think it went over into the next period.

Q. Then you had the Garibaldi job in the next period, a State highway job. That was hauling rock and other roadbuilding material from stock piles to the job?
A. Stock piles, yes.

Q. Then you had the City of Newport, Oregon, job?
A. That is right.

(Testimony of Joseph H. Schestak.)

Q. That was resurfacing a street?

A. Yes, sir.

Q. And the rock was hauled from a quarry and made available by the city? A. Yes, sir.

Q. Then in the last period you had a resurfacing job for the Highway Department of the State of Washington?

A. Yes, the State of Washington.

Q. That was rock and roadbuilding material hauled from stock piles to the job site?

A. Yes, sir.

Q. You also had a job at Clatskanie?

A. Yes.

Q. That was trucking rock from stock piles to the job site? A. Yes.

Q. Ten you had the Toppenish, Washington, city street job? A. City street. [32]

Q. Toppenish, Washington? A. Yes.

Q. That was hauling crushed rock from a quarry or stock pile to the job? A. That is right.

Q. Then the last one was Crater Lake. Was that a large job? That was a major job, wasn't it?

A. That was a good-sized job; yes, sir.

Q. A lot of hauling on that job, wasn't there?

A. Quite a bit, yes.

Q. That was resurfacing a State highway. How long a highway was it you were resurfacing, do you remember? A. I don't remember.

Q. You were hauling crushed rock from the stock pile to the job site? A. Right.

(Testimony of Joseph H. Schestak.)

Q. Substantially, those are the jobs, the construction jobs, which your company was engaged in during those years? A. Yes.

Q. As I understand, it was necessary to haul all this road-building material to the job site?

A. Yes.

Q. From stock piles or quarries? A. Yes.

Q. For that purpose you contracted or made verbal agreements [33] with these owners to come there and furnish a truck and driver at so much per load basis or mile basis or a combination of both? A. Yes.

Mr. Winter: I think that is all.

(Witness excused.)

Mr. Duffy: I would like to offer in evidence, if the Court please, photostatic copies of claims filed by these various plaintiffs for refunds of the transportation taxes. Mr. Winter has prepared these photostatic copies and I assume there is no objection.

Mr. Winter: Objected to on the ground of being incompetent, irrelevant and immaterial. I call attention to Page 3 of the stipulation where it is admitted claims for refunds were filed and that they were denied. The contentions of the parties with respect to the claims are set forth, and these add nothing to this case whatever.

The Court: They are admitted.

(Photostatic copies of claims for refunds, filed with the Collector, were thereupon re-

ceived in evidence and marked Plaintiff's Exhibits 2, 3 and 4, respectively.)

The Court: Proceed. [34]

PERRY O. DeLAT

was thereupon produced as a witness on behalf of Defendant, out of order, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Would you state your name?

A. Perry O. DeLat.

Q. What is your business or occupation?

A. Supervisor of motor permits for the Public Utilities Commission of Oregon.

Q. You were subpoenaed to be here and bring with you the records of the State of Oregon covering permits issued to truck owners holding motor transportation permits? A. Yes, sir.

Q. I will ask you what your records show with respect to the permits which had been issued during any part of this period to E. W. Albano.

Mr. Duffy: I object to the testimony regarding what these drivers might have stated in making applications for permits with the Public Utilities Commissioner on the ground that they are hearsay, and these drivers are here in court and can testify as to their status.

The Court: Admitted, subject to the objection. Can't you stipulate on all of this?

(Testimony of Perry O. DeLat.)

Mr. Winter: If Counsel will stipulate, yes. We are prepared [35] to show that these truck owners working for the plaintiffs, hauling for these plaintiffs in these cases, have made application and have been granted motor vehicle permits, licensed as carriers for hire.

Mr. Duffy: I have never examined the records. If Counsel states that is what the record shows, I will stipulate that they have made application.

The Court: And, if Mr. DeLat were examined, he would so testify from the official records?

Mr. Duffy: I understand he would testify these various truck drivers applied for and received PUC permits.

Q. (By Mr. Winter): What license would they have?

A. They would have, prior to January 1, 1948, carrier permits provided by law that authorized carrier operation, including the transportation of logs, poles, piling, lumber, wood, the operation of dump trucks in connection with highway or building construction, and the operation of trucks of any description in transporting ores or concentrates from mines, pits or quarries, either for hire or for themselves.

Q. If the trucks in question were leased or rented to the plaintiff corporation, would it be necessary for them to have a license with your department similar to the licenses issued to the truck owners?

(Testimony of Perry O. DeLat.)

A. A permit can only be issued to the actual operator of the motor vehicle. If they are under lease, then the lessee is [36] required to hold the permits.

Q. Did the plaintiff during any of this period have such a permit with the State of Oregon?

A. They have had permits—I don't know. I couldn't state the exact status. They have held permits, yes, and may at the present time.

Q. In connection with these trucks?

A. No.

Q. Covering trucks which they own, is that right?

A. That they own or lease—that they operate.

The Court: The emphasis is on operating rather than ownership?

A. That is right.

Mr. Winter: I didn't hear the Court's question.

The Court: The emphasis is on operation rather than ownership?

A. That is right. If they are not owned, they file a lease; the lessee files a lease and then he becomes the operator and holds the permit under Oregon law.

Q. (By Mr. Winter): All of the trucks owned by these individuals were registered or licensed in their names, and not in the plaintiff's?

A. That is right.

Q. The plaintiff, on any truck that is owned or operated, was required to take out a permit? [37]

A. That is right.

(Testimony of Perry O. DeLat.)

Q. Was it the same license as was issued to these individuals?

A. It could be, or it could be a private carrier's license which authorized transportation of their own property whether by dump truck or otherwise.

Mr. Winter: You do not contend plaintiffs took out any licenses on these trucks owned by these individuals, do you, Mr. Duffy?

Q. Is it necessary to furnish evidence of insurance, public liability? A. Yes, sir.

Q. Did all of these drivers or truck owners carry such insurance?

A. They did, as long as their license was in effect.

Q. And they furnished such information to your department? A. It is on file; yes, sir.

Mr. Winter: I think that is all.

Cross-Examination

By Mr. Duffy:

Q. What is the amount of that insurance they are required to carry under this particular plate?

A. Transportation of property requires \$5,000-\$10,000 property damage limits and—public liability limits, and \$5,000 property damage.

Q. Is the arrangement the same as with others in this area, such as logging operations? [38]

A. The same form and same practice, yes.

Q. In other words, log haulers, hauling at so much a thousand for somebody, are required to have these same plates?

(Testimony of Perry O. DeLat.)

A. That is right.

Mr. Duffy: That is all.

(Witness excused.) [39]

J. N. CONLEY

was thereupon produced as a witness on behalf of Plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. You are J. N. Conley? A. Yes.

Q. You are one of the plaintiffs in Causes No. 4133, 4134 and 4135? A. Yes.

Q. In the first case, doing business as Babler and Conley and, in the second case, doing business as Babler Brothers? A. Yes, sir.

Q. You are no longer connected with the company? A. No.

Q. You are not? A. No.

Q. What were your duties during this period from December 1, 1942, to April 1, 1945?

A. Well, I was a partner and owner and superintendent.

Q. You were superintendent; that is, out on the job? A. Yes.

Q. On what jobs were you superintendent? Just state generally.

A. Well, at the Redmond Air Base and others, mostly in Central Oregon. [40]

(Testimony of J. N. Conley.)

Q. When you say you were general superintendent, that means you were the one in charge of the whole operation? A. Yes.

Q. Would you tell the Court the manner in which these truck owners and drivers were brought onto the job?

A. Well, generally they would come to the job seeking work and declaring that they had trucks for rent, and they would put their names on a list and at such time as we needed trucks we would contact them and hire them.

Q. What type of trucks were used on these projects? A. Mostly dump trucks.

Q. What materials were being hauled?

A. Well, there was gravel and cinders and powder and explosives of all kinds and——

Q. Mostly bulk construction material?

A. Yes.

Q. Supposing you had a truck owner who owned more than one truck, how would the drivers for the other trucks be employed?

A. Well, frequently during the war the owners would come short of drivers and frequently they did not have anyone in mind to transport the trucks to the job, so we would help them to choose from our crew and send men out to drive their trucks.

Q. Did you have a union contract at that time?

A. Yes.

Q. Did you employ all men through the union?

A. Yes, as long as they could supply them. We

(Testimony of J. N. Conley.)

also maintained a list of drivers at our job office and when and if we needed them we would call them.

Q. This list has been developed from men who had applied to you for work?

A. That is correct.

Q. What are your exact duties, Mr. Conley, or what were they? Did you have any immediate supervision or methods to be employed there?

A. Yes.

Q. Supposing the drivers, either owners or others, should prove unsatisfactory. Do you have the right to fire them?

A. Oh, yes, and we frequently did.

Q. Did you supervise the method in which they did the work? A. Yes.

Q. Just what type work was it? Just state briefly the nature of the hauling.

A. Well, the majority was dump truck work, transporting dirt, rock, cinders and anything required in the construction of the air base.

Q. Did they haul from a shovel or from a quarry?

A. Well, from bunkers and shovels; bunkers and shovels.

Q. Where did they take the materials?

A. To the Air Base. Frequently we had rock excavations, local excavations. They would work under shovels, and haul from the [42] shovel to the fill.

(Testimony of J. N. Conley.)

Q. Some of these trucks were working right on the Air Base? A. Yes.

Q. They were all maintained and employed in the same way?

Mr. Winter: That is leading.

A. Yes.

Q. (By Mr. Duffy): Were the trucks required to report for work at the same time as the other employees? A. Yes.

Q. Did the truckers haul for you exclusively during these periods of time?

Mr. Winter: If he knows.

A. I don't understand.

Q. (By Mr. Duffy): If you know, during this period of time they were working for you did they have to work for you alone or could they haul for other people and keep their job with you?

A. No; they were expected to be on the job if they were in our employ.

Q. In controlling the trucks did you have someone in immediate supervision at the shovel or at the bunker? A. Yes.

Q. To tell them where to spot their trucks?

A. Yes.

Q. What other directions were given to the truck drivers by [43] either you or other representatives of the company as to the method in which they should perform the job?

A. Well, they were told to be at a certain place at a certain time in the morning, and they were

(Testimony of J. N. Conley.)

directed to which shovel to be loaded at. Of course, they were directed which roads to take as they came on the Air Base. They were directed to the dump and the time of their arrival was recorded.

Q. Who kept the time?

A. Roy Shurte.

Q. If one of the trucks broke down, would the company render any assistance?

A. Well, generally the basis of hiring the truck would determine whether or not they did. If there was anything in the way of emergency assistance required, it would be rendered them. Your trucks are generally rented on a basis of bare or with drivers, or any way to form some basis of arriving at the pay, and we used several methods.

Q. Were drivers who were the owners of trucks paid overtime if they worked more than eight hours a day, more than forty hours a week, I should say?

A. Yes.

Q. They were paid overtime? A. Yes.

Q. How many hours a week did they work?

A. Well, they worked ten hours a day and seven days, although [44] at various times they worked different shifts.

Q. In the event that any driver, whether he was the owner or a non-owner, performed his work unsatisfactorily in any way, did you have the right to tell him "You are through"? A. Yes.

Mr. Duffy: That is all.

(Testimony of J. N. Conley.)

Cross-Examination

By. Mr. Winter:

Q. When you fired a truck owner, did you have the right to keep his truck, or did you hire him and the truck both?

A. That is generally the way.

Q. Did you have the right to keep his truck?

A. Well——

Q. If you fired him?

A. I felt that we did, yes.

Q. You had the right to keep his truck?

A. Well, yes, I thought that we had.

Q. Did you ever fire anybody and keep his truck?

A. Well, I fired several owner that left their trucks there.

Q. They did leave their trucks, but they could have taken them away if they had wanted to?

A. That question was never brought up.

Q. Lots of truck owners fired their own drivers, didn't they?

A. Well, they expressed dissatisfaction.

Q. I say, they did, didn't they? [45]

A. I don't remember that they did.

Q. You don't remember any truck owner ever firing one of the drivers that he brought there?

A. Well, as I say, they expressed dissatisfaction and I think probably we just paid them off. After all, we needed the trucks.

Q. Well, he had an agreement to drive a truck at so much per yard mile, didn't he? A. No.

(Testimony of J. N. Conley.)

Q. Or so much per hour? A. Yes.

Q. Didn't you have any agreement on the job at so much per yard mile? A. No, sir.

Q. The owners were all on an hourly basis?

A. No, there was some by the trip.

Q. By the trip? A. Yes.

Q. How long a trip was that?

A. Well, roughly, five miles, variably.

Q. What? A. Variably.

Q. Yes.

A. There were several hauls, some of them four and a half to six miles.

Q. Four and a half to six miles? [46]

A. Yes.

Q. The price per trip depended upon the length of the trip? A. That is right.

Q. If it was a short trip, of course you paid less per trip than if it was a long trip?

A. That is correct.

Q. A good many of the truck owners had more than one truck? A. Yes.

Q. They had been hauling on other jobs before they came to work for you?

A. I believe they had.

Q. They all had licenses as common carries, didn't they, or for hire? A. Not all.

Q. Did any of them operate under your license?

A. Well, only these trucks that went out on the highway were required to have Public Utilities permits.

(Testimony of J. N. Conley.)

Q. All of the trucks which you contracted for with the truck owner had licenses, didn't they?

A. No.

Q. What? A. No.

Q. Name one that did not. A. Adams.

Q. Who? [47]

A. A fellow by the name of Adams.

Q. How many trucks did he have?

A. I believe he had one.

Q. Where did he work?

A. He worked on the Air Base.

Q. Did he leave the Air Base? A. No.

Q. Were there any trucks that worked for you, outside of Mr. Adams, that did not have a license?

A. That is pretty difficult to say.

Q. You should be able to name more than one, shouldn't you? A. No.

Q. Name one more.

A. Myself. I had one.

Q. You had one truck? A. Yes.

Q. Did you work for the company as an employee or were you a partner?

A. I just put my truck to work and allowed myself rent.

Q. You allowed yourself rent? A. Yes.

Q. That was not part of the partnership assets?

A. No. They were part of the J. N. and M. J. Conley equipment.

Q. When it was necessary to get drivers, you contacted the union and saw if they had any drivers?

(Testimony of J. N. Conley.)

A. My usual method was to report it to my job office, and then they started in with the union and hunted until they found a driver.

Q. I think you said in case one of these truck owners——

A. Pardon.

Q. If they had an emergency or any truck was in the way and you had to get busy you helped out with company equipment, is that right?

A. Yes.

Q. In case there was no emergency, and a truck wasn't in the way, and you had plenty of trucks, you did not bother with it then?

A. Well, it would depend on how the man was working, how the equipment was hired.

Q. If it was hired at so much an hour, so you were not paying anything out, you did not have to go out and fix it?

A. Some are at so much an hour, less reasonable wear and tear, and some are at so much an hour including reasonable wear and tear; others were hired at so much an hour, including everything, fully operating.

Q. "Fully operating," that means furnishing a driver?

A. That means furnishing a driver's wages, yes.

Q. And furnishing the driver, too. How many of these owners furnished their own drivers? Many of them furnished their own drivers, didn't they?

A. That is correct.

Q. Drivers who had been with them for years?

(Testimony of J. N. Conley.)

A. I wouldn't know that. I imagine they could have been.

Q. Some of these truck owners had lots of trucks and they were going from contract to contract? A. Yes.

Q. They would bring all of their equipment?

A. Yes.

Q. All of their trucks and drivers, who stayed with them during this job—A good many of them did, didn't they? A. Yes.

Q. You say it was very difficult to get men to drive trucks at that time. The truck owners were having just as much difficulty in getting men as you were, weren't they? A. Yes.

Q. Other contractors were having a great deal of difficulty in getting men?

A. I believe so.

Q. It was to your advantage to get men to drive these trucks that these truck owners furnished?

A. No, the purpose in hiring a truck if we had no driver——

Q. You did all you could to see that a driver was available, then? A. That is right.

Q. It did not make any difference whether you went out and [50] secured them or whether the truck owner went out and secured them, as long as they were secured?

A. A man that was secured had to be capable of driving a truck and have a driver's license.

Q. A truck owner had the right to say what

(Testimony of J. N. Conley.)

driver drove his truck. If he was not satisfied, he could say to take him off of it, couldn't he?

A. They did not complain.

Q. And they did do that, didn't they?

A. Well, they did not complain——

Q. What?

A. Not without my approval, they didn't.

Q. But you have never left a driver on an owner's truck when he did not want the driver, have you?

A. I don't recall if that case arose.

Q. In other words, whenever the owner of a truck did not want a driver, and he complained to you about it, he was removed, wasn't he?

A. Not always.

Q. Well, he was in most cases; let us put it that way.

A. Well, I don't remember a single case where—the thing was generally settled before it got to me.

Q. Always settled before it got to you?

A. In a case like that they frequently got in quarrels and had trouble on the road and the driver would walk off and leave the [51] truck and the owner would come and say, "Do you have a driver?"

Q. You were all the time looking for drivers for these trucks to see that the equipment moved, weren't you?

A. Well, we had about fifteen trucks, I believe, of our own.

Q. About fifteen trucks of your own?

(Testimony of J. N. Conley.)

A. Yes.

Q. Those were licensed with the state, weren't they? A. Most of them.

Q. All those that went off your own particular property were licensed with the state as private carriers?

A. Those that went out onto the public highway, yes.

Q. And you paid insurance on those trucks?

A. Yes.

Q. None of the owners or drivers could suggest that you fire any of your own men, could they?

A. I beg your pardon.

Q. None of these truck owners or drivers could suggest that you fire any of your own truck drivers?

A. They would have no point in doing that.

Q. They did not even try to, did they?

A. Actually, they did, yes. Some drivers you hire would be not very good, not good suitable people, not good drivers, liable to have accidents, and for the common good it would be suggested that they be removed, whether from our truck or that man's truck or whoever it was. [52]

Q. They wanted to protect their own skins, didn't they? A. Well, probably.

Mr. Winter: That is all.

Redirect Examination

By Mr. Duffy:

Q. Were these owners paid on the payroll?

A. Yes.

(Testimony of J. N. Conley.)

Q. They were paid the same time as the others?

Mr. Winter: We think the records are the best evidence of how or what they were paid. He is not the bookkeeper. He does not know what they were paid.

Q. (By Mr. Duffy): I am asking if you know whether the truck owners were paid at the same time and in the same manner as the other employees on the job?

A. I signed every check on the job.

Mr. Duffy: That is all.

Recross-Examination

By Mr. Winter:

Q. You signed two checks, the same as Exhibit No. 1 shows? A. No, just the payroll.

Q. How would they get the balance of what they had coming on an hourly basis for their trucks?

A. The general office.

Q. What? A. From the general office.

Mr. Winter: That is all.

Redirect Examination

By Mr. Duffy:

Q. They were paid on the job for their labor and were paid from the Portland office for rentals?

A. Correct.

Mr. Duffy: That is all.

(Witness excused.) [54]

LLOYD BABLER

was thereupon produced as a witness on behalf of Plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. You are a plaintiff in all three of these suits, covering these three periods? A. Yes, sir.

Q. You were a partner in the company at all times? A. Yes.

Q. What was your position in the company, your duties?

A. Bidding on the work and discussing our policies with Mr. Conley. I was on the job a part of the time and some of the jobs I supervised myself.

Q. Your job was supervising some of these projects? A. Yes.

Q. Which of these jobs required your supervision?

A. Well, the Salem Air Base was one of them, and I think there was one down on the Coast, and I spent some time on the Air Base at Redmond.

Q. You have heard the testimony of Mr. Conley. Will you state whether or not the method of operation on the jobs which you supervised was basically the same as that as to which Mr. Conley has testified? A. Well, they were very similar, yes.

Mr. Duffy: That is all.

Mr. Winter: No questions.

(Witness excused.)

ROY SHURTE

was thereupon produced as a witness on behalf of Plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. Your name is Roy Shurte. Am I pronouncing that correctly?

A. Yes, sir; that is right.

Q. What was your job during the period from December 1, 1942, to December 31, 1945?

A. I was field timekeeper for Babler Brothers and J. N. Conley and M. J. Conley.

Q. Field timekeeper?

A. That is right, in the field office.

Q. On all of these projects?

A. Not all of them, no. I was at the Redmond Air Base and Klamath Falls.

Q. Would you say you were on the larger projects?

A. The larger projects quite a ways from Portland, yes.

Q. Just what were your duties as timekeeper?

A. Keeping time, making the payroll and time records before they were sent to Portland. [56]

Q. How did you make up these time records?

Mr. Winter: We do not deny that they kept the time of these trucks or that they kept these records.

Q. (By Mr. Duffy): How were the men paid, Mr. Shurte?

(Testimony of Roy Shurte.)

Mr. Winter: We think the books are the best records, the best evidence as to how they were paid. The statement shows how they were paid, the representative statement.

Q. (By Mr. Duffy): Let me ask you this, Mr. Shurte: In paying the wages of the truck owners—

Mr. Winter: We object to using the word “wages.” That is one of the issues to be determined, whether or not it is compensation for services or whether or not it is a payment under a contract for hauling. That is one of the issues here.

Q. (By Mr. Duffy): In connection with the payment of compensation for the services of these men who were driving trucks, were Social Security deductions, unemployment deductions and other deductions made as withholding payments, made from their compensation? A. That is right.

Q. How were men selected to drive these trucks?

A. I usually had quite a list, had a regular card file in the office, and they would come in and want a driver and I would call one of them.

Q. How did you compile that?

A. As they would come and apply to me, or maybe the union [57] representative would come down from Bend and leave a list of names that he would have available.

Q. Would you give us a typical example of your manner of operation? Suppose the information was conveyed to you that there was a truck without a driver—

(Testimony of Roy Shurte.)

A. The first thing I would do would be to contact the superintendent if possible; if not, I would usually find a driver and send him right out to the truck.

Q. Where would you find this driver?

A. From that list that I had compiled.

Q. Did you have to clear them through the union?

A. Not necessarily; in some instances we did, when they had a representative right there, close by, but their office was in Bend. Of course, lots of our drivers came from Bend. That was about sixteen miles away.

Q. Was the union able to furnish enough drivers? A. Not at all times, no.

Q. They permitted you then to hire other men when their lists were exhausted?

A. That is right.

Q. Did you have anything to do with hiring or firing these men? A. Not personally, no.

Q. When were the men required to report for work in the morning?

A. There were some jobs that started at 6:00 o'clock, some that [58] started at 7:00 and some that started at 8:00. It depends on where we were working. At one time we was working around the clock.

Q. Were truck drivers required to report for work the same as all the other employees?

A. That is right.

(Testimony of Roy Shurte.)

Q. What was the method you followed in terminating your relationship with these truck drivers?

A. Well, how do you mean?

Q. Suppose a superintendent on the job dismissed a truck driver for any reason; what was your bookkeeping practice?

A. I would make out his payroll check at the time.

Q. Your duty, then, consisted of compiling the payrolls and paying the men?

A. That is right.

Q. The truck rentals were not paid by you, is that correct?

A. I compiled the truck rental all right on these check sheets; I would always double-check the sheets that came in from both ends of the job.

Q. Where did you send those sheets?

A. Most of these sheets were filed in the Portland office. I reduced it down to a form and then mailed the form to Portland.

Q. And Portland would send to the truck owner the amount of the truck rental?

A. That is right, less deductions. [59]

Mr. Duffy: That is all.

Cross-Examination

By Mr. Winter:

Q. When you say "truck rental," the Portland office would send them the balance of the amount due, which was agreed upon, whether the contract

(Testimony of Roy Shurte.)

was on a yard-mile basis or on an hourly basis, is that right?

A. Would send them the balance that was due after deductions.

Q. After they deducted Social Security taxes of drivers of trucks? A. That is right.

Q. The same as Exhibit A attached to the stipulation, is that right?

A. I don't know anything about Exhibit A. The deal was we would rent trucks.

Q. I beg your pardon?

A. We would rent trucks—would go out and get trucks from anybody we could.

Q. When a truck owner did not have a driver for his truck, would he come to you for a driver?

A. Oftentimes, yes.

Q. Then you would get a driver for the truck owner? A. Yes.

Q. For his truck? A. Yes. [60]

Q. They always accepted those driver that you got?

A. I don't know of any instance where they turned them down. I knew most of the drivers around the country, who they had driven for and so on.

Q. You knew most of them? A. I did.

Q. What did you tell them, that John Jones, truck owner, needed a truck driver?

A. Either that or John Jones would be waiting for a driver and I would turn him right over to him.

(Testimony of Roy Shurte.)

Q. Then the owner of the truck would talk to him?

A. Not necessarily. I would show him the truck and turn him loose.

Q. The owner would just show him the truck and turn him loose? Did any owners come and complain to you about drivers that were not satisfactory?

A. I don't know that they did.

Q. What?

A. I don't know.

Q. Was there ever any wreck or anything?

A. Yes, there were wrecks.

Q. And some truck drivers would be fired?

A. I don't know that that had anything to do with it.

Q. The owners always reserved the right to say who was going to drive a truck, if they wanted to?

A. Well, I imagine they would, as long as they owned the truck.

Q. They could take a truck off the job any time they wanted to?

A. I don't know as they did.

Q. They could have?

A. I didn't authorize such things myself.

Q. Some of them came and worked a day or two and then left there?

A. That happens on all jobs.

Q. They came and stayed as long as they wanted to and then they left?

A. No, not necessarily.

Q. Some of them only worked a day or two and then left?

A. True.

(Testimony of Roy Shurte.)

Q. Some worked longer terms?

A. Maybe we didn't need them any longer than a day or two.

Q. Either they did not want to stay or you did not want them, either one or the other.

A. Well, there was usually a little dissatisfaction someplace.

Q. So they pulled off the truck and left, is that right? A. I guess it is.

Q. And they would take the drivers with them, if they wanted to?

A. That did not always happen. [62]

Mr. Winter: That did not always happen, but it did happen. That is all.

Redirect Examination

By Mr. Duffy:

Q. You could put one of these drivers on a truck without consulting the owner?

A. We did, yes.

Recross-Examination

By Mr. Winter:

Q. When did you put a driver on a truck without consulting the owner? Was he away?

A. He might have been 500 miles away. We had his trucks. We had them hired.

Q. You did not consult him then?

A. No, there was no way we could.

Q. You had authority to do it, to put a driver on his truck?

A. We had authority to do that.

(Testimony of Roy Shurte.)

Q. That was your agreement with him?

A. That was our agreement.

Q. But if he came back and found a driver that was not satisfactory, he always had the right to come in and take him off?

A. He could come in and make a suggestion, yes.

Mr. Winter: And take him off. That is all.

(Witness excused.)

(Recess.)

Plaintiffs Rest. [63]

Defendants' Testimony

L. M. CASE

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is L. M. Case?

A. Yes.

Q. Where do you reside?

A. At No. 216 North 23 Street, Salem, Oregon.

Q. What is your business or occupation?

A. I am a truck operator.

Q. By truck operator do you mean you hold a license as a carrier for hire? A. Yes.

Q. How long have you been operating as a carrier for hire? A. Since 1921.

(Testimony of L. M. Case.)

Q. Since 1921? A. Yes.

Q. Have you ever entered into any agreement to operate your trucks for the plaintiffs in this action, these suits, during any part of the period involved?

A. Yes, I worked for them.

Q. When was that?

A. I think it was in 1943. [64]

Q. On what job was that?

A. The Salem Airport.

Q. On the Salem Airport? Were you hired as a truck driver or were you hired with your truck?

A. I was hired with my truck.

Q. In other words, I take it you were hired as a unit? A. Yes.

Q. Did you understand you could be fired and that they could have kept your truck?

A. No, I didn't understand that.

Q. What was your agreement? Just state it to the Court.

A. I went to work for them for so much an hour for myself and truck, as a unit.

Q. As a unit? A. Yes.

Q. Were you at liberty to leave at any time?

A. Yes, I felt I was.

Q. Was it your understanding you could have been fired and another driver could have been put on your truck? A. Pardon?

Q. Did you understand you could have been fired and another driver could have been put on your truck?

(Testimony of Jack Becker.)

(Testimony of L. M. Case.)

A. No, wasn't no agreement to that effect.

Q. Have you entered into agreements as a carrier for hire with other companies during the past years? [65] A. Yes.

Q. I take it now you have some agreement with the County?

A. Just an oral agreement.

Q. For you and your truck as a unit?

A. Yes.

Mr. Winter: I think that is all.

Cross-Examination

By Mr. Duffy:

Q. Mr. Case, were you required to belong to the union when you worked for the plaintiffs?

Mr. Winter: We will object to that.

A. I don't remember whether I belonged to the union at that time or not. I have belonged to the union.

Q. (By Mr. Duffy): Do you have a Social Security number? A. Yes.

Q. On these jobs with the plaintiffs were amounts deducted from your compensation as Social Security?

A. Yes. They deducted that.

Q. Could the plaintiffs at any time fire you off the job if they did not like the way you were driving the truck?

A. Well, I imagine they could fire me and the truck.

(Testimony of L. M. Case.)

Q. On the job itself, did some representative from the plaintiff direct you how to do your job?

A. Yes.

Q. Have you ever registered with the Collector of Internal Revenue as a person engaged in transportation of property for hire?

A. Pardon. I didn't quite get that.

Q. Have you ever registered with the Collector of Internal Revenue here as a person engaged in transportation of property for hire?

Mr. Winter: I don't know why it is material. I think that would be something that we might talk about, but I don't see how that is material here now. As a matter of fact, we receive requests for returns every month and a few file them.

Mr. Duffy: The basis for my question is subsection (e) of Section 3475 of this same Act which imposes a transportation tax, and then it provides the criminal penalty. If the Government is attempting to show by their registration with the Public Utilities Commission of Oregon that these men felt they were engaged in transportation of property for hire, I make the equal point that by not registering with the Collector they negate that same proposition.

Mr. Winter: We will stipulate that we receive requests for returns every month and that returns have been made where the Collector has collected on transportation of property. Those are truckers just the same as these, if you want us to admit that.

(Testimony of L. M. Case.)

Mr. Duffy: I don't want you to admit that. I think you get my point. What I want this witness to answer, as a typical [67] truck owner-operator, is whether he is registered with the Collector as one engaged in transporting property for hire.

The Court: He may answer.

A. Yes, I am registered.

Q. (By Mr. Duffy): You have registered?

A. Yes.

Q. When did you make this registration?

A. Well, I think it was soon after I went there.

Q. Did you register for this particular job?

A. I didn't receive any tax paper on the job so I didn't return any.

Q. Did you make any demand upon plaintiffs for transportation tax? A. No, I didn't.

Q. Did you file any return with the Collector or report to him?

Mr. Winter: I submit he has answered. He said he did not collect any transportation tax.

Mr. Duffy: He is required to report to the Collector.

The Court: Ask your question again.

Q. (By Mr. Duffy): Did you make any demand upon the plaintiffs for the transportation tax? A. No, I didn't.

Q. Did you report that fact, or the fact that you were not paid a transportation tax, to the Collector? A. No, I didn't. [68]

(Testimony of L. M. Case.)

Q. What were the terms of your arrangement with the plaintiffs on this Salem Air Base?

A. I hired out myself and truck at so much an hour.

Q. Was there any amount deducted from the amount paid to you for what we have termed payroll insurance?

A. Well, I don't remember just what was deducted. I didn't keep any records. It has been quite a while back.

Q. As far as you can recall, the only item deducted was your wage or that of another driver, driving one of your trucks?

A. I only had one truck.

Q. The company then paid Social Security taxes on you? A. Yes.

Mr. Duffy: That is all.

Redirect Examination

By Mr. Winter:

Q. Have you reported any transportation tax where you have hired out as truck and driver to other companies? A. Yes, I have.

Q. Did those companies always keep your tax and keep you on the payroll as an employee?

A. Some of them do and some don't.

Q. Some don't? A. Yes.

Q. Is it not a fact you receive every month forms of returns as to the transportation tax from the Internal Revenue Department? [69]

A. Yes, I do.

(Testimony of L. M. Case.)

Q. Have you collected any transportation taxes—If you collect any transportation taxes, then you report it and pay it? A. Yes, I did.

Mr. Winters: That is all.

Recross-Examination

By Mr. Duffy:

Q. Did you file any reports while working for these plaintiffs? A. No, I didn't.

Mr. Duffy: That is all.

(Witness excused.) [70]

E. W. ALBANO

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is E. W. Albano?

A. Yes.

Q. Edward W. Albano? A. Yes.

Q. Where do you reside?

A. 7031 Southeast 41st.

Q. In Portland, Oregon?

A. Portland, Oregon.

Q. You have a license to operate as a carrier for hire under the laws of the State of Oregon?

A. Common carrier on No. 4 PUC permit.

Q. How many trucks do you have?

A. At present I have eight gravel trucks.

Q. Did you have any doing any hauling—Did

(Testimony of E. W. Albano.)

you ever do any hauling for Babler Brothers during the period here involved?

A. Yes, I had two trucks working for them on the Gresham job and two trucks working for them on the Fort Klamath job.

Q. Who were driving those trucks?

A. Well, I believe one of the drivers was a fellow named Holms and another, my brother. [71]

Q. Did Mr. Holms work for you some time? How long did Mr. Holms work for you?

A. Quite some time.

Q. How long would you say?

A. Oh, at that period, three years; that is, three seasons.

Q. He had been driving a truck for you on other jobs besides the Babler jobs?

A. Right.

Q. I think you operated a fleet of eight trucks?

A. Yes.

Q. Who drove the other truck? Were there two trucks? A. Well, I don't remember.

Q. It was your brother, wasn't it?

A. My brother did drive one and a fellow by the name of Holms drove another one.

Q. Were the other six trucks working on other jobs at the time?

A. Yes, they were working on other jobs.

Q. What was the occasion for your agreement with Babler Brothers when you put two trucks to work down there?

(Testimony of E. W. Albano.)

A. Well, I personally had no agreement. The drivers went out and solicited the jobs.

Q. They went out and solicited the jobs?

A. That is right.

Q. What did you receive for the use of your truck and driver [72] on these jobs?

A. Well, sir, what the actual pay was I don't know, but I received a check for the driver's wages and the gas and oil were deducted.

Q. Who carried the public liability and property damage insurance on your trucks?

A. I carry my own fleet insurance.

Q. Who pays for the upkeep, maintenance, and repair, and gas and oil?

A. That is my——

Q. What was the basis for the amount you received for the use of these trucks and drivers?

A. I don't remember.

Q. You don't remember? A. No.

Q. Well, do you recall whether or not the wages and Social Security taxes on the wages of the drivers were deducted from the amount that was paid to you?

A. I remember the driver's wages and gas and oil was deducted.

Q. What about the Social Security and unemployment tax? Was that deducted from your overall pay? A. That I can't remember.

Q. Could Bablers have taken your drivers and put them on other trucks?

(Testimony of E. W. Albano.)

A. Well, that I don't know. I can't answer that question for [73] this reason: At the time these trucks worked it was a short job and I would have no occasion whatsoever——

Q. Could you replace the drivers on these trucks at any time you wanted to?

A. Well, yes, I could have, if there had been occasion for it.

Q. You did replace them whenever you wanted to?

A. Not on a particular job.

Q. On any job which you were on?

A. Yes.

Mr. Winter: I think that is all.

Cross-Examination

By Mr. Duffy:

Q. Did you drive a truck yourself?

A. No, sir.

Q. You were not on any of these jobs personally with your trucks or that your trucks were on with the plaintiffs here, Babler Brothers?

A. No.

Q. And you do not know anything about the operation of them?

A. No.

Mr. Duffy: That is all.

(Witness excused.) [74]

JACK BECKER

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is Jack Becker? A. Yes.

Q. You are also known as Jacob Becker. What is your correct name, Jacob? A. Yes.

Q. Where do you live, Mr. Becker?

A. 1706 Northeast Going, Portland, Oregon.

Q. How many trucks do you own?

A. At present just one.

Q. During the period December, 1943, through 1945, did you own two trucks?

A. That is right.

Q. Who drove those trucks? Walt Perry?

A. Yes.

Mr. Duffy: Let the witness answer.

Mr. Winter: I am just refreshing his memory.

A. Yes, Walt Perry on Babler's job.

Q. Who hired Walt Perry?

A. I did myself.

Q. Did you have occasion to do any hauling for Bablers during [75] any of this period, any hauling of gravel or truck work?

A. Well, at that time, yes.

Q. What jobs did you work on?

A. Well, the first job I worked on was up at Kennewick, Washington, Toppenish and Clatskanie,

(Testimony of Jack Becker.)

and the following year I worked at Bend, Burns and Fort Klamath. That is the only jobs I worked on for Babler.

Q. As I take it, you drove one truck and Walt Perry drove the other truck?

A. That is right.

Q. Were you employed as a driver or were you employed as a unit, driver and truck?

A. Driver and truck.

Q. What about the other truck?

A. It was driver and truck, too.

Q. As a unit? A. Yes.

Q. The agreement was made with you, was it, for both trucks? A. That is right.

Q. Was any agreement made with Walt Perry except what you made with him? A. No.

Q. Who carried the insurance, public liability and property damage, on the trucks?

A. Myself. I did myself. [76]

Q. Were you licensed by the State of Oregon as a carrier for hire? A. That is right.

Q. And holding license PUC, plates No. 4?

A. That is right.

Q. Who paid for the upkeep and maintenance on the truck? A. I did myself.

Q. Could they have replaced you with anyone on these trucks under your agreement that you had with them? A. Not unless I wanted them to.

Q. Could they have replaced your driver?

A. No.

Mr. Winter: I think that is all.

(Testimony of Jack Becker.)

Cross-Examination

By Mr. Duffy:

Q. You carried this public liability and property damage insurance incidental to your PUC permit, is that right? A. That is right.

Q. Is it not a fact that the company also carried further public liability and property damage insurance on all trucks on the job?

Mr. Winter: We don't know what they might have carried.

A. Not my truck. We carry our own insurance on our trucks.

Q. (By Mr. Duffy): Yes, I understand that, but, in addition to that, do you know whether or not the company also carried [77] similar insurance? A. That I don't know.

Q. Were Social Security amounts deducted from the amounts paid to you? A. That is right.

Q. Did you belong to the union at that time?

A. That is right.

Q. Could the company have terminated your working on the job if they had wanted to?

A. Yes.

Q. On the job itself what right did the company have to tell you how to do the job?

A. Well, it is their job. They just hire trucks and we take orders from them. We have to do as they tell us.

Q. They would tell you where to spot the trucks for loading?

(Testimony of Jack Becker.)

A. Where to haul from and where to.

Q. Where to haul from and where to and what routes to take? A. Yes.

Q. Were you ever paid overtime for working in excess of 40 hours a week?

A. They paid us overtime, yes, if we worked overtime and deducted it from our truck checks.

Q. Did you register with the Collector as a person engaged in the transportation of property for hire? A. Yes. [78]

Q. How did that come about? What caused you to register?

A. Well, the first time I ever paid the 3 per cent transportation tax.

Q. Did you make any demand on the plaintiffs for this transportation tax?

A. No, the first time I ever come in on that would have been 1942, I believe 1942 or 1943. I don't remember any more. On George H. Buckler's job at Vanport we collected it from them and then paid it to the Revenue.

Q. You were told by the company there to go down and register? A. Yes.

Q. Your agreement with the company was to use your trucks and you, in your instance, drove one yourself and your driver drove your other truck?

A. That is right.

Q. Was anything said about how long your work was to continue?

(Testimony of Jack Becker.)

A. No. We always asked them how long the job would last and they would tell us.

Q. They could have discharged you at any time before that? A. Any time.

Q. And you could quit any time you wanted to?

A. Yes.

Mr. Duffy: That is all. [79]

Redirect Examination

By Mr. Winter:

Q. Any day you did not want to take your truck down you would not have taken it down?

A. No.

Q. They could not put any driver on your truck that you did not want on your truck? A. No.

Q. Now, you say Burford—while working for Burford you paid the transportation tax.

A. No, George H. Buckler.

Q. What kind of a job was that?

A. That was at Vanport, when they built Vanport.

Q. You mean just hauling gravel?

A. Yes.

Q. Similar type hauling? A. Yes.

Q. They told you where to put the material?

A. Yes, just hauled it in there on the street.

Q. Then they paid you the transportation tax?

A. Jed Wilson at Seaside, paid it to me, too.

Q. Did they withhold Social Security taxes?

A. Well, most of them, they did.

(Testimony of Jack Becker.)

Q. They held it out and charged it against your truck? A. Yes. [80]

Q. The same as Babler did? A. Yes.

Q. Is that the common practice with what we call gypo haulers?

A. A majority of them, yes.

Mr. Winter: I think that is all.

Recross-Examination

By Mr. Duffy:

Q. Do you know whether or not Mr. Buckler has filed a claim for refund of the transportation taxes? A. No, I don't know.

Mr. Duffy. That is all.

(Witness excused.)

WILLIAM M. ANDERSON

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is William M. Anderson?

A. Yes.

Q. Where do you reside, Mr. Anderson.

A. 7604 Southeast Lanphear, Milwaukee, Oregon.

Q. How far is Milwaukie from Portland?

A. Where we live it is in the suburbs of Portland.

(Testimony of William M. Anderson.)

Q. Just in the suburbs? A. Yes.

Q. Are you the owner of any trucks?

A. I have two at the present time.

Q. How many trucks did you own during the time involved in this lawsuit, between December, 1942, and December, 1945?

A. Well, I would say from one to three.

Q. Are you licensed under the State of Oregon Motor Transportation Act as a carrier for hire?

A. That is right.

Q. Your trucks carry PUC License No. 4?

A. That is right.

Q. Did you ever have occasion to enter into any agreement for use of your services and truck in hauling for the Bablers? [82] A. Yes.

Q. When was that, Mr. Anderson?

A. The first time I worked for them was in 1941, I think, and off and on since then.

Q. After December, 1942, where did you work?

A. We worked at the Redmond Air Base.

Q. The Redmond Air Base? A. Yes.

Q. How many trucks did you have at that time?

A. Three.

Q. Who were the drivers of those trucks?

A. Well, there were so many of them it would be hard to say—coming and going, you see.

Q. Did you drive one truck?

A. I drove one part of the time, yes.

Q. What was the agreement with Bablers as to the furnishing of three trucks and drivers, or what was your agreement?

(Testimony of William M. Anderson.)

A. Well, it is customary to take your own drivers when you went on a job. You usually do that when you are working somewhere else.

Q. Your own drivers? A. Yes.

Q. You always attempted to hold drivers that you knew were competent. You always attempted to have drivers you knew were competent to take care of your equipment? [83] A. Oh, yes, sure.

Q. Is that what you mean? A. Yes.

Q. Who carried the insurance on your trucks?

A. I had my own. You are required to do that by the State.

Q. Who paid for the upkeep on the trucks?

A. I paid my own.

Q. Did you, under your agreement with Bablers, understand that you had the right to say who should drive your trucks?

A. Yes, as a rule.

Q. Who paid the wages on the trucks?

A. Babler.

Q. Who? A. Babler.

Q. They deducted that from the amount that you got under your agreement, is that right?

A. That is right.

Q. You could have taken your truck off the job at any time, could you?

A. Well, during the war there was the ODT agreement, and I think if they demanded to keep your truck they could at that time.

Q. You mean the Office of Defense Transportation agreement? A. Yes.

(Testimony of William M. Anderson.)

Q. They were certified to the job, weren't they?

A. Not necessarily, but I understood if they wanted to they could hold them.

Q. They could not have fired you and kept the truck? A. That was never brought up.

Q. You don't think they could?

A. No, I don't think so.

Q. You did not understand the agreement that way, did you? A. No, not exactly; no.

Mr. Winter: I think that is all.

Cross-Examination

By Mr. Duffy:

Q. While you worked for Babler did you consider yourself an employee of Babler?

A. Oh, yes.

Mr. Duffy: That is all.

Redirect Examination

By Mr. Winter:

Q. Did you consider your truck as an employee of Babler?

A. Well, they are paying you for use of it.

Q. You could have quit on the job any time you wanted to, outside of this ODT agreement?

A. That is right.

Q. Have you been talking to Mr. Babler since you talked to me this morning? A. No. [85]

Q. Weren't you talking with them in the hall a few minutes ago?

Mr. Duffy: Just a minute, now.

(Testimony of William M. Anderson.)

Q. (By Mr. Winter): You talked with them since we left downstairs at 1:00 o'clock?

A. Oh, yes, right here.

Q. Before you took the stand? A. Yes.

Q. Whom else have you entered into agreements with in connection with your truck?

A. Oh, Ward.

Q. Whom are you working for now?

A. I am not working now.

Q. When were you working for Ward Northwest? A. Oh, last September.

Q. What? A. Last September.

Q. How many trucks did you furnish on that job? A. Just two.

Q. You drove one? A. No.

Q. Did you drive either one of them?

A. No.

Q. Who hired the drivers on those trucks?

A. They were drivers I had when I went there.

Q. They were drivers that you had hired before?

A. Yes.

Q. And they were on the trucks? A. Yes.

Q. You had an agreement with them to do hauling similar to this job here?

A. Yes, the same, practically the same.

Q. Who paid the Social Security tax on their wages? A. They did; the company paid them.

Q. And then they charged it back to you?

A. That is right.

Q. Did they pay the transportation tax to you?

(Testimony of William M. Anderson.)

A. No, they didn't.

Q. Did you file a transportation tax return?

A. No.

Q. When you say you considered Bablers as your employers——

A. At the time when I was working for them, yes.

Mr. Winter: That is all.

(Witness excused.)

Mr. Winter: That is the Government's case, if the Court please.

(Defendant rests.)

Plaintiff's Rebuttal Testimony

J. N. CONLEY

having been previously duly sworn, was recalled as a witness on behalf of Plaintiffs, in rebuttal, and was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. Mr. Conley, on these jobs did you rent other equipment besides trucks? A. Oh, yes.

Q. What other kinds of equipment did you rent?

A. Tractors, power shovels, compressors, and all kinds of construction tools that we did not own.

Q. When you rented this equipment were operators furnished with them, in some instances?

A. Yes.

(Testimony of J. N. Conley.)

Mr. Winter: Objected to as incompetent, irrelevant and immaterial. There is no tax asserted here on anything like that. I do not see the materiality of it and it is not proper rebuttal, certainly.

The Court: Go ahead.

Q. (By Mr. Duffy): Were truck drivers ever put on other jobs, other than driving truck?

A. Oh, yes.

Mr. Duffy: That is all. [88]

Cross-Examination

By Mr. Winter:

Q. When they were put on other jobs they were employed for those other jobs, weren't they? They were employed on a different basis?

A. Well, on the same pay, but probably you would call them different, like a jackhammer man. Just take him off a truck and put him on a jackhammer.

Q. Who paid the Social Security tax on the wages then? A. They did.

Q. Did you charge it back to anybody? Did you charge it to any truck?

A. There was no truck involved.

Q. Did you charge it back to anyone?

A. No.

Q. You assumed the burden and paid the tax on that, didn't you? A. Which tax?

Q. The Social Security tax, when a man was driving a tractor for instance?

A. Oh, when a man was driving a tractor, that

(Testimony of J. N. Conley.)

would depend on the deal when you hired the tractor.

Q. If you paid \$50 for a tractor, you generally took the Social Security tax out of the \$50.

A. Yes, we did. [89]

Q. What? A. Yes, we did.

Q. If you hired an operator with it, you mean?

A. If it came fully operated, we charged it back to the owner.

Q. Charged it back to the owner? A. Yes.

Mr. Winter: That is all.

Mr. Duffy: That is all.

(Witness excused.)

(Testimony closed.)

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Official Reporter of the above-entitled Court, do hereby certify that on the 4th day of April, 1949, I reported in shorthand certain proceedings occurring in the trial of the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction and that the foregoing transcript, consisting of pages numbered 1 to 90, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said date, as aforesaid, and of the whole thereof.

Dated this 11th day of July, A.D. 1949.

/s/ IRA G. HOLCOMB,
Court Reporter.

[Endorsed]: Nos. 12317-12318-12319. United States Court of Appeals for the Ninth Circuit. Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, doing business as Lloyd Babler, Appellees; and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. J. N. Conley, M. J. Conley and Lloyd Babler, doing business as Babler and Conley, Appellees; and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, doing business as Babler Brothers, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed August 3, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States
Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12319

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon.

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY, HARRY BAB-
LER and LLOYD BABLER, dba Babler
Brothers,

Appellees.

No. 12318

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY, and LLOYD
BABLER, dba Babler and Conley,

Appellees.

No. 12317

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

LLOYD BABLER, RICHARD BABLER,
JAMES A. POLLOCK and J. H. SCHE-
STAK, dba Lloyd Babler,

Appellees.

ORDER

This matter coming on to be heard this date upon motion of the appellant in the above-entitled proceedings for an order consolidating the three cases as a single case on appeal upon a consolidated transcript of records, and the Court having considered said motion and being advised in the premises,

It Is Ordered that the above-entitled cases be and hereby are consolidated as a single case on appeal upon a consolidated transcript of the records.

Made and entered this 29th day of July, 1949, at San Francisco, California.

/s/ WILLIAM J. HEALY,

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

Judges U. S. Court of Appeals
for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

MOTION TO CONSOLIDATE THE CASES
AND DOCKET ALL THREE AS A SIN-
GLE CASE UPON APPEAL UPON A CON-
SOLIDATED TRANSCRIPT OF THE
RECORDS

Now Comes the appellant in the above-entitled proceedings and states that he has filed notices of

appeal in the United States District Court for the District of Oregon from judgments entered on May 26, 1949; viz: J. N. Conley, et al., dba Babler Bros. v. Earle, Civil No. 4135, J. N. Conley, et al., dba Babler and Conley v. Earle, Civil No. 4134, Lloyd Babler, et al., dba Lloyd Babler v. Earle, Civil No. 4133.

And the said appellant moves that the three cases be consolidated as a single case on appeal upon a consolidated transcript of the records. The grounds of this motion are that the questions of law involved in all three cases are identical and that the facts in the three cases are substantially identical, so that they are susceptible of treatment by consolidation, and the three cases were consolidated for trial in the District Court.

HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the Appellees of the foregoing Motion to Consolidate the Cases and Docket All Three as a Single Case Upon Appeal upon a Consolidated Transcript of the Records by depositing in the United States Post Office at Port-

land, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for Appellees.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed Aug. 2, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH THE
APPELLANT INTENDS TO RELY ON
APPEAL AND APPELLANT'S DESIGNA-
TION OF RECORD FOR PRINTING

Comes now the United States of America, appellant named above, and for a statement of points on which appellant intends to rely on this appeal says.

The statement of points to be urged by appellant in this Court are the same as those set forth in the statements of points with the District Court pursuant to Rule 75(d) of the Federal Rules of Civil Procedure.

Appellant designates for printing under one cover the entire records filed with this Court, and designates one Reporter's Transcript to be contained in the transcript of record.

Dated this day of August, 1949, at Portland,
Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the Appellees of the foregoing Statement of Points on Which the Appellant Intends to Rely on Appeal and Appellant's Designation of Record for Printing by depositing in the United States Post Office at Portland, Oregon, on the 29th day of August, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Carl E. Davidson and Charles P. Duffy, 1525 Yeon Building, Portland, Oregon, Attorney of record for appellees.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 30, 1949.

